DOCKET

No. 83-1240-CFX Title: New York, Petitioner
Status: GRANTED v.
Oneida Indian Nation of New York State, etc., et al.

Docketed: Court: United States Court of Appeals
January 26, 1984 for the Second Circuit

Vide: Counsel for petitioners: Schiff,Peter H., van Gestel,Allan
83-1065

Counsel for respondent: Hirsch,Bertram E., van Gestel,Allan, Coulter,Robert T., Locklear,Arlinda

Entry	Date	Note	Proceedings and Orders
1	Dec 13 1983		Application for extension of time to file petition and order granting same until January 27, 1984 (Marshall, December 19, 1983).
2	Jan 26 1984	G	Petition for writ of certiorari filed.
3	Jan 26 1984		Appendix of petitioner New York filed.
4	Feb 10 1984		Supplemental brief of petitioner New York filed.
5	Feb 27 1984		Brief of respondent Oneida of Thares Banc, etc. in opposition filed. VIDED.
6	Feb 28 1984		DISTRIBUTED. March 16, 1984
7	Mar 1 1984	X	Brief of respondents County of Oneida, et al. in opposition filed.
8	Mar 19 1984		Petition GRANTED. The case is consolidated with No. 83-1065 and a total of one hour is allotted for oral argument. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.
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10	Apr 17 1984		Order extending time to file brief of petitioner on the merits until June 4, 1984.
11	May 29 1984		Order further extending time to file brief of petitioner on the merits until June 15, 1984.
12	May 31 1984		Application for leave to file amicus brief in excess of the page limits filed with Marshall, J. by United States (A-925).
13	May 31 1984		Order granting same not to exceed 40 pages by Marshall, J.
14	Jun 4 1984		
15	Jun 14 1984		Brief amicus curiae of Escondido Mutual Water Co. and Vista Irrigation District filed. VIDED.
16	Jun 15 1984		Brief amicus curiae of C.H. Albright, et al. filed. VIDED.
17	Jun 15 1984		Brief amicus curiae of American Land Title Assoc. filed. VIDED.
18	Jun 15 1984		Brief of petitioners Oneida, NY, et al. filed. VIDED.
19	Jun 15 1984		Joint appendix filed. VIDED.
20	Jun 15 1984		Brief of petitioner New York filed. VIDED.
21	Jun 18 1984		Brief amicus curiae of County of Seneca, NY, et al filed. VIDED.
22	Jun 26 1984	G	Motion of petitioners for divided argument and for additional time for oral argument filed.
23	Jun 29 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.

No. 83-1240-CFX

Entry	Date	Note	Proceedings and Orders
24	Jul 2 1984		Further application for leave to exceed page limits of amicus curiae of the U.S. filed, and order denying same by Marshall, J., on July 5, 1984. (A-985)
25	Jul 2 1984		Response of petitioners in No. 83-1065 to motion of Solicitor General to argue as amicus curiae filed.
26	Jul 6 1984		Brief amicus curiae of County of Franklin, NY, et al. filed.
27	Jul 12 1984		Brief of respondents Oneida Indian Nation of WI, et al. filed. VIDED.
28	Jul 16 1984		Brief of respondents in 83-1240, County of Oneida, NY, et al., filed. VIDED.
29	Jul 16 1984		Brief of respondent Oneida of Thares Banc Council filed. VIDED.
30	Jul 16 1984		Brief amicus curiae of Assn. on American Indian Affairs, et al. filed. VIDED.
31	Jul 16 1984		Brief amicus curiae of United States filed. VIDED.
32	Jul 23 1984		CIRCULATED.
33	Aug 8 1984		Motion of petitioners for divided argument and for additional time for oral argument GRANTED. and fifteen additional minutes are allotted for that purpose.
34	Aug 9 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument GRANTED. and fifteen additional minutes are allotted for that purpose.
35	Aug 9 1984		SET FOR ARGUMENT. Monday, October 1, 1984. (3rd case) This case is consolidated with No. 83-1065. (1 hr.)
36	Aug 10 1984		Reply brief of petitioners County of Oneida, et al. filed. VIDED.
37	Sep 21 1984	X	Reply brief of petitioner New York filed. VIDED.
38	Sep 22 1984	X	ARGUED.
39	Oct 1 1984		

PETITION FOR WRIT OF CERTIORARI

83-1240

No.

FILED
JAN 26 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and the County of Oneida, New York and The County of Madison, New York,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appeals and Opinions

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Dated: January 25, 1984

Questions Presented.

1. Whether an Indian Tribe enjoys a private right of action under the Federal common law or pursuant to the Trade and Intercourse Act of 1793 to recover damages for the use and occupation of lands allegedly obtained from said Indian Tribe in violation of the Trade and Intercourse Act of 1793.

2. Whether a State by negotiating treaties with an Indian Tribe in alleged violation of the Trade and Intercourse Act of 1793 may be held to have waived impliedly its immunity to suit in Federal court by non-Indian claimants, the only claimants against the State involved here.

3. Whether, since the Federal courts would lack jurisdiction over the State in an original action brought against the State by the Counties because of the State's sovereign immunity, the courts also lack ancillary jurisdiction on the same issues.

4. Whether, assuming the existence of Federal jurisdiction to hear the Counties' claims, substantive New York law would permit the imposition of an award against the State in an amount other than that specifically provided by the New York law of real property.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

The petitioner, the State of New York, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Second Circuit entered in this action on September 29, 1983.

Opinions Below.

Three decisions were rendered by the District Court for the Northern District of New York (Edmund Port, D.J.), dated respectively July 12, 1977, October 5, 1981 and May 5, 1982. The decision and order dated July 12, 1977, which, *inter alia*, held that the defendants-third party plaintiffs Counties of Oneida and Madison were liable to the plaintiffs for wrongful possession of the plaintiff's land, is set forth as Appendix "A" (1a-60a).* It is reported at 434 F Supp 527 (NDNY, 1977). The decision dated October 5, 1981, which was dictated from the bench and which decided the issue of damages, is set forth as Appendix "B" (61a-83a). It is not reported. The decision dated May 5, 1982, which was dictated from the bench and which, *inter alia*, held that the third-party defendant State of New York must indemnify the defendants third-party plaintiffs for any damages assessed, is set forth as Appendix "C" (84a-95a). It is not reported.

The opinion for affirmance of the Court of Appeals dated September 29, 1983 is set forth as Appendix "D" (96a-147a) and is not yet reported. Although the Court of Appeals remanded the case for a recalculation of damages, the decision of the Court of Appeals finally determined the legal issues raised by the action.

Jurisdiction.

The judgment of the United States Court of Appeals was entered on September 29, 1983. By order dated December 19, 1983, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including

*Numbers hereinafter appearing in parentheses followed by the letter "a" refer to pages in the separate appendix filed herewith.

January 27, 1983. This petition for certiorari is filed within that time. This Court's jurisdiction to review the case rests upon 28 USC § 1254(1).

Constitutional and Statutory Provisions Involved.

United States Constitution, Article I, section 8; Article III; The Tenth Amendment; The Eleventh Amendment, and the Trade and Intercourse Act of 1793 are set forth in pertinent part in Appendix "E" (148a-153a).

Statement of the Case.

This action was originally brought by the Oneida Indian Nation of New York State* ("Oneida Indians") against the County of Oneida, New York and the County of Madison, New York. The action seeks damages for the use and occupation of certain lands during the years 1968 and 1969 which lands were secured through a chain of title commencing with patents issued by the State of New York. In that action it was contended that the State of New York did not have title and could not transfer the lands because it had obtained the lands by treaty with the Oneida Indians in 1795 which was allegedly in violation of the Trade and Intercourse Act of 1793.

The Counties by third-party complaints sought judgment against the State of New York for any amounts recovered against them by the original plaintiffs. By decision and order dated July 12, 1977, the District Court ruled that the Counties were liable to the plaintiffs for wrongful possession of the plaintiffs' land. On October 5, 1981, following a trial on the issue of damages, the District

*Also known as the Oneida Indians of New York, and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc.

Court entered a judgment against the Counties in favor of the plaintiffs in the following sums:

Against Madison County	$9,060.00, plus interest
Against Oneida County	$7,634.00, plus interest

The State of New York moved for an order pursuant to Rule 12(b) (1) (2) (6) of the Federal Rules of Civil Procedure dismissing the third-party complaints for (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, and (3) failure to state a claim upon which relief can be granted. The Counties cross-moved from summary judgment.

By decision and order dated May 5, 1982, the District Court denied the State's motion and granted the Counties' motion. A final judgment in favor of the Counties and against the State was entered on May 19, 1982.

All three parties appealed to the United States Court of Appeals for the Second Circuit. On September 29, 1983, the Court of Appeals affirmed both the judgment of the District Court holding the Counties liable for illegal occupation of the plaintiffs' land and its judgment that the State of New York must indemnify the Counties for any damages assessed against them. The matter was remanded for further proceedings relating to the issue of damages.

In ruling as it did, the Court of Appeals held, *inter alia*, that at the time of the 1795 purchase of their land by the State of New York, the Oneida Indians enjoyed a Federal common law right of action for occupancy and use of their lands and that such common law right of action had not been preempted by the Trade and Intercourse Act of 1793.

(104a-108a). The court held additionally that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State (132a-133a); that the State, in purchasing the Oneidas' land, had impliedly waived its Eleventh Amendment immunity to suit (134a-137a); and that under New York law the Counties were entitled to be indemnified by the State for any damages assessed against them (133a-134a). In a dissenting opinion (137a-147a), Circuit Judge Meskill stated that he would reverse and remand with directions to dismiss the complaint upon the ground that an Indian Tribe does not possess a private cause of action to recover damages for wrongful possession.

Reasons for Granting the Writ.

I.

The decision of the court below raises significant and recurrent issues concerning the rights of Indian Tribes to maintain direct actions to recover damages for wrongful occupancy and use based upon alleged violations of the Trade and Intercourse Act.

In holding that an Indian Tribe enjoys a Federal common law right of action to recover damages for wrongful occupancy and use based upon alleged violations of the Trade and Intercourse Act, the court below has established a far-reaching precedent the implications of which extend to millions of acres of land in the eastern United States. Although the instant dispute only involves 871.92 acres of land and a judgment in the amount of $16,694, plus interest, for two years' occupancy and use thereof, nothing in the opinion of the Court of Appeals would prevent these plaintiffs, or any other Indian Tribe, from suing for the full value of all land acquired from them at any

time during the history of the United States where such acquisition was made in alleged violation of the Trade and Intercourse Act.

The implications of the Court of Appeals decision are truly staggering, as is laid out more fully in the related petition for a writ of certiorari filed by the Counties of Oneida and Madison, New York in No. 83-1065, October Term, 1983. Without repeating that able discussion, we do note that if, for example, the present plaintiffs were to bring a subsequent action for damages based upon the same grounds, but seeking recompense for wrongful occupancy and use of the same 871.92 acres for the remaining 186 years of alleged wrongful occupancy and use and assuming for the sake of illustration the same damage award for each year as allowed by the District Court here, the total amount of damages, exclusive of interest, would amount to $1,552,542. Simple interest, figured at six percent per annum, would add more than $8.5 million to the award. When it is remembered that the potential claim area consists of hundreds of thousands of acres of land in New York State alone, the enormous impact of the Court of Appeals decision becomes apparent, potentially involving awards running into the hundreds of millions or conceivably billions of dollars. Moreover, the Court of Appeals decision leaves wholly open the possibility not only of further damage actions, but of actions in ejectment as well. The dislocations which such actions would engender, even if the suits were ultimately to prove unsuccessful, must be viewed with the utmost seriousness. As noted by Judge Meskill in his dissenting opinion, the holding by the Court of Appeals in this case is truly novel. We submit that the issues raised are clearly of sufficient moment to warrant the granting of this petition and we urge this Court to do so.

The Court of Appeals bases its conclusion that the plaintiffs may maintain this direct action for damages against the current occupiers of the subject land upon two somewhat interdependent propositions. The court reasons first that the Oneidas, in 1795, possessed a Federal common law right of action to recover damages for wrongful occupancy and use of their land which right of action was not preempted by the Trade and Intercourse Act of 1793 (104a-108a). Second, the court finds that the Congress, in enacting the Trade and Intercourse Acts, had intended the Indians to have an implied private right of action to enforce its provisions (108a-120a). We submit that the Court of Appeals was in error in both respects and that the issues, in any event, warrant review by this Court.

There can be no question but that, from the outset, the relationship between the United States and the indigenous Indian populations living within the boundaries of the nation has been one of guardian and ward. See, e.g., *United States v. Sandoval*, 231 US 28, 46 (1913); *Cherokee Nation v. Georgia*, 30 US (5 Pet) 1, 17 (1831). It follows from this special relationship, and it has long been the law, that Indian Tribes may be held subject to liabilities under the Federal law only where Congress has explicitly so provided. See *United States v. United States Fidelity & Guaranty Co.*, 309 US 505 (1940); cf. *United States v. Kagama*, 118 US 375 (1886). It should likewise follow that any Federal rights which an Indian Tribe possesses must derive from specific congressional authority as well. See *Jaeger v. United States*, 27 Ct Cl 278, 284-85 (1892). Since, in regard to damage actions for wrongful possession, congressional authority is completely absent, no right of action should be inferred.

The court below cites as authority for the proposition that an Indian Tribe possesses a common law right of ac-

tion for wrongful possession the cases of *Johnson v. M'Intosh*, 21 US (8 Wheat) 543 (1823) and *Marsh v. Brooks*, 49 US (8 How) 223 (1850). However, in neither of those cases were the parties to the dispute Indians. Thus, while it may be conceded that the early common law recognized a right of action based upon Indian title, this is a far different thing from asserting, as does the court below, that such right of action lay with the Indians. As was stated by Chief Judge Marshall in *Cherokee Nation v. Georgia, supra*, 30 US (5 Pet) at p 18:

> "At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of a right or a redress of a wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, *and might furnish some reason for omitting to enumerate them among the parties who might sue in the Courts of the Union.*" (Emphasis supplied.)

Even assuming that a Federal common law cause of action in favor of the Indians existed prior to 1793, such cause of action was preempted by the Trade and Intercourse Acts.

It is settled law that when Congress directly and comprehensively addresses a question previously governed by Federal common law, the common law is preempted. *Milwaukee v. Illinois*, 451 US 304 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 US 1 (1981). The Court of Appeals, while acknowledging this to be the law, nevertheless concluded that the

Trade and Intercourse Acts did not preempt any common law right of action possessed by the Indians because (107a):

> "[t]he Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. • • • There is no evidence to suggest that Congress intended to deny common law remedies to the Indians."

That the Trade and Intercourse Acts did not "speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment", however, does not support its conclusion. Whatever might have been the case prior to the passage of the Trade and Intercourse Act of 1793, thereafter a comprehensive pronouncement dealing fully with the broad issue of trade and intercourse with the Indians and enunciating in detail both the conduct which was proscribed and a mechanism for the law's enforcement was firmly in place. Moreover, the absence of any language speaking "directly to the Indians' ability to enforce their possessory rights by an action in ejectment" speaks at least as eloquently for the proposition that the Second Congress did not believe that the Indians were possessed of such an ability as it does for the converse.

An examination of the relevant statutory language bears this point out. Section 1 of the Trade and Intercourse Act of 1793 provided that no person "shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant

licenses for that purpose" (150a). It required a bond "in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes" (*id.*). Section 2 authorized the person issuing the license "to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, • • • and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained" (150a). Section 3 provided that persons attempting to trade with Indian tribes or found in Indian country without such a license "shall forfeit all the merchandise offered for sale to the Indians, or found in his possession • • • and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days" (150a).

Section 4 of the 1793 Act provided that citizens or inhabitants of the United States who committed crimes in Indian territory against friendly Indians "which, if committed within the jurisdiction of any state, • • • against a citizen thereof, would be punishable by the laws of such state • • • [would] be subject to the same punishment, as if the offence [*sic*] had been committed within the state or district, to which he or she may belong, against the citizen thereof" (150a).

Section 5 of the 1793 Act provided that "if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, • • • he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months • • •; And it shall, moreover, be lawful for the President of the United States, to take such measures

as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who may have, or shall hereafter make, or attempt to make a settlement thereon" (151a).

Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory," and provided that persons so purchasing horses without such a special license would "forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars • • •" (151a).

Section 11 of the 1793 Act authorized the President and the territorial governors "on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences [*sic*] or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law" (152a).

Finally, section 12 of the 1793 Act provided that "all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use" (152a).

As the foregoing recitation makes clear, the Trade and Intercourse Act of 1793 was comprehensive both in terms of its scope and in the range of its enforcement mechanisms, which included forfeitures, criminal penalties,

suspensions or revocations, and, ultimately, the direct involvement of the President of the United States.*

Moreover, as was observed by Judge Meskill in his dissent, Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines v. Davidowitz*, 312 US 52 (1941), this Court held invalid under the Supremacy Clause a Pennsylvania alien registration statute which interfered with a subsequently enacted Federal law involving the same subject, notwithstanding the fact that the State and Federal legislation were not explicitly contradictory and there was present no express congressional intent to override State legislation. The underpinning of the *Hines* decision was the fact that the State statute fell into potential conflict with the Federal law in the sensitive area of intergovernmental relations and that, since the Federal government was the agent of foreign policy and had determined that a particular scheme of registration was necessary in order to avoid friction with other nations, the State statute had to fall. These same considerations apply with equal force here. As Judge Meskill stated (142a):

> "The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to

*Indeed, the very fact that the Second Congress vested the power of removal in the Executive Branch lends strong support to the proposition that the issues raised in these actions are more properly to be resolved by political action rather than by judicial fiat. This was suggested by Judge Meskill in his dissenting opinion, and if certiorari is granted, we will argue this point more fully.

> reassure Indians who had grown 'restive'. This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statute at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F2d 327 (2d Cir, 1981). *See Illinois v. Outboard Marine Corp.*, 680 F2d 473, 478 (7th Cir, 1982)."

In view of the great importance placed by the Congress and the President on the matter of Indian affairs in the 1790s, it is difficult to conceive that the Congress did not believe that it was speaking "directly and comprehensively" to the question of trade and intercourse with the Indians when it enacted the Trade and Intercourse Act of 1793. Moreover, and as was noted by Judge Meskill in his dissenting opinion below (143a):

> "Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated."

We submit that the Trade and Intercourse Act of 1793 did, in fact, preempt any common law right of action which the Indians may have possessed prior to that law's enactment, and that the failure of the law to "speak

directly" to the narrow issue of "common law rights" in no way alters this result. Cf. *Hines v. Davidowitz*, 312 US 52 (1941).

Nor is the Court of Appeals correct in holding that in enacting the Trade and Intercourse Act the Congress intended the Indian tribes to have a private right of action based upon its violation. While it might perhaps be argued that the Trade and Intercourse Act was passed for the protection of the Indian tribes,* nothing contained in either the language of the 1793 Act or in its legislative history tends to support in the slightest the proposition that the sanctions and enforcement provisions contained therein were intended by the Congress to be anything other than exclusive. Certainly the fact that the Trade and Intercourse Act of 1793 was essentially a criminal statute militates strongly against any other conclusion (see, e.g., *Chrysler Corp. v. Brown*, 441 US 281, 316 [1979]), as does the fact that the sanctions contained in the Act would, if utilized, have provided a full and adequate remedy to the Indians for its violation. Indeed, the very failure of Congress to have provided for a private right of action in favor of the Indians when it could so easily have done so, lends strong support to the proposition that Congress either did not wish to enact such a remedy or that it never considered the issue. In either event, the conclusion would be the same—no private right of action was intended. Cf. *Transamerica Mortgage Advisors v. Lewis*, 444 US 11 (1979), where this Court refused to recognize an implied right of action for damages under section 206 of the Investment Advisors Act of 1940, a statute very similar to the Trade and Intercourse Act of 1793.

*In view of the fact that the Trade and Intercourse Act was passed in order to avoid a war with the Indian tribes, the "special beneficiaries" of the Act may not in the eyes of Congress have been the Indian tribes at all, whose sovereign powers were severely limited thereby (see *United States v. Wheeler*, 435 US 313, 326 [1978]), but may indeed have been the citizens of the United States themselves.

Here the implication of a private right of action by the court below seems to have rested in large measure on the view below (117a-118a) that the President or the Executive had failed in its obligations to protect Indian rights. But this Court has previously made plain that judicial dissatisfaction with the Executive provides no basis for implying judicial causes of action where enforcement authority has been vested specifically in the Executive. *Employees v. Missouri Department of Public Health and Welfare*, 411 US 279, 285-287 (1973).

We submit that an Indian tribe does not enjoy a private right of action under the Federal common law or pursuant to the Trade and Intercourse Act of 1793 to recover damages for the use and occupation of lands allegedly obtained from said Indian tribe in violation of the Trade and Intercourse Act. The Court of Appeals should so have held.*

II.

The decision below, by permitting the Counties' cross claims against the State, also raises significant and recurring issues in regard to the immunity of States to suits in the Federal courts.

The court below, in holding that the State of New York, by dealing with the Oneida Indians in alleged violation of the Trade and Intercourse Act of 1793, had impliedly consented to a waiver of its Constitutional immunity for suits by the Counties totally misread and misapplied the teachings of this Court in *Edelman v. Jordan*, 415 US 651

*If certiorari is granted, we also reserve the right to argue that the plaintiffs' claims are barred by the applicable statute of limitations and that the 1795 conveyance of the plaintiffs' right of occupancy to the State of New York was ratified by the United States.

(1974); *Employees v. Missouri Department of Public Health and Welfare*, 411 US 279 (1973); and *Parden v. Terminal Railway Co.*, 377 US 184 (1964). Moreover, because the ruling of the Court of Appeals goes to the very heart of the doctrine of sovereign immunity, and has application far beyond the confines of this particular controversy, we believe that this issue also fully warrants review by this Court.

The mere fact that New York may have entered into a federally regulated sphere of activity in dealing with the Oneidas is under this Court's decisions plainly insufficient, in and of itself, to constitute a waiver of the State's immunity. Contrary to the decision below, there is especially no basis for such a conclusion with respect to the State's dealing with non-Indian third parties, the only type of parties suing the State here.

In *Edelman v. Jordan*, 415 US 651 (1974), this Court emphasized that in cases involving a State the first question that must be considered is whether Congress has authorized a suit to be brought against a class of defendants which includes the States. Justice Rehnquist noted in *Edelman* (at p 672):

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."

Such authorization is also missing from the Trade and Intercourse Act.

The logic of the Court's position in *Edelman* is compelling. The ultimate question before a court looking at an alleged implied waiver of the Tenth or Eleventh Amendments is whether Congress intended to require that waiver.

This question was never addressed by the Court of Appeals. We submit that there is contained in the Trade and Intercourse Act not the slightest evidence of a congressional intent to create a private right to sue a State in the Federal courts, and the Court of Appeals should so have held.

The basic reliance of the court below (135a-137a) on *Parden v. Terminal Railway Co.*, 377 US 184 (1964), is misplaced for other reasons as well. There this Court held that Alabama, by operating a railroad in a proprietary manner for a profit in interstate commerce, had impliedly waived its immunity to suits in the Federal courts. The court below characterized the State's acquisition from the Oneidas as proprietary (136a), and found *Parden* controlling. But New York's acts in securing possession of lands to which it held legal title as sovereign* were acts of a sovereign nature and the State was not engaging in private enterprise. The importance of this point cannot be overstated because in *Employees*, *supra*, 411 US 279 (1973), this Court *limited* application of *Parden* to cases in which the States were engaged in profit-making commercial programs. In *Employees*, State employees sought overtime compensation which was allegedly due them under the Fair Labor Standards Act (29 USC § 216b). In holding that the State of Missouri was immune from suit in the Federal courts based upon alleged violations of the Act this Court distinguished *Parden*, saying, 411 US at p 284:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier

*Title to the lands had been in the State of New York since the successful conclusion of the Revolutionary War. It was, however, encumbered by the Oneida Indians' right of occupancy. See, e.g., *Clark v. Smith*, 38 US (13 Pet) 195 (1839).

> a federal court is not competent to render judgment against a nonconsenting State. *Parden* involved the railroad business which Alabama operated 'for profit'. 377 U.S., at 185. *Parden* was in the area where private persons and corporations normally ran the enterprises."

The Court added, p 285:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."

The Court said further, pp 286-287:

> "It is true, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear."

Moreover, this Court in *Employees* distinguished *Parden* on the further ground equally applicable here that another

remedy existed; specifically, there the Secretary of Labor was authorized to enforce the rights of individual employees by actions against employers, including States. Those provisions, the Court said (411 US at 286):

> "suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States • • • ."

Here, the President was also given remedial authority, a fact that just as in *Employees* militates strongly against a remedy of waiver by the State. Indeed, this is especially so since the claimed waiver here relates not to suits by Indians, but rather solely to the cross-claim of the Counties. We strongly urge consideration of this Tenth and Eleventh Amendment issue by this Court.

III.

The decision below raises significant and recurring issues regarding Federal court jurisdiction with respect to third-party claims against a State.

In ruling that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State of New York, the Court of Appeals focused its attention solely upon the question of whether the Counties' actions for indemnification arose out of the "same core of facts" as did the Oneidas' claims against the Counties and, having concluded that they did, held that no independent basis for jurisdiction was necessary (132a-133a). We submit that the focus of the court's inquiry was too

narrow, and that because the third-party defendant in this case was a nonconsenting State, the indemnification action should have been dismissed.

In *Aldinger v. Howard*, 427 US 1 (1976), this Court stated (p 18):

> "If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of the pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. • • • "

There the Court held that a county could not be included as a party in a Federal action simply because it might be required to indemnify the other defendant under state law. The Court explained that even though the third-party claims would be within the scope of Article III jurisdiction because of a "common nucleus of operative facts", it must also be determined if Federal jurisdiction may otherwise be negated. While in that case the Court focused on Congressional intent, it would appear that an immunity to suit under the Constitution should represent an equally strong barrier to a third-party claim.* Nor is there any meaningful difference between that case and the present one because the third party from whom indemnity is sought has been brought in by the defendant, although we recognize that in *Aldinger* the Court declined to determine if there were any " 'principled' differences between pendent and ancillary jurisdiction • • • ".

*Article III of the Constitution originally provided that the Federal courts had jurisdiction in controversies "between a State and citizens of another state". The Eleventh Amendment limited that power by providing it did not extend to suits prosecuted by a citizen or subject of a foreign State against a State. *Hans v. Louisiana*, 134 US 1, 13 (1890), held that the bar included actions by citizens of the same State.

Because of the importance of the jurisdictional issue involved, which directly relates to the limits of Federal judicial power and because this Court has not yet addressed the issue of ancillary jurisdiction insofar as that doctrine is applicable to a nonconsenting State, we believe that certiorari should be granted.

The court below erred in completely disregarding the constitutional impediment to the Counties' actions—the State's sovereign immunity. This point was considered in *United States v. United States Fidelity & Guaranty Co.*, 309 US 506 (1940), where this Court said, p 513:

> "Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent."

Jones v. Scofield Bros., Inc., 73 F Supp 395 (D Md, 1947), illustrates this limitation with respect to States. In *Jones*, the original defendant sought a judgment against the State Roads Commission of Maryland as a third-party defendant. The Commission, as a State agency, claimed Eleventh Amendment immunity. The court there granted a motion to dismiss the third-party complaint against the State Roads Commission as third-party defendant, saying that the doctrine of sovereign immunity is still the law and

that while many jurisdictions have waived or partially waived their immunity to suit, Maryland had not done so. The court held that the Commission was immune from suit and that the advisability of the immunity was a legislative question.

The court below relied on *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F2d 583 (2d Cir, 1965); *Dery v. Wyer*, 265 F2d 804 (2d Cir, 1959) and *Ayer v. General Dynamics Corp.*, 82 FRD 115 (SDNY, 1979). However those cases are inapposite; none of them deal with a State as a third-party defendant. In all three, the courts held that no independent ground for jurisdiction against a third-party defendant is necessary in an action where the court's original jurisdiction was based upon diversity grounds. The need for complete diversity, however, is a judicial determination and one which was within the power of Congress to have changed. In those cases there was involved no constitutional objection to jurisdiction. In the instant case, quite to the contrary, lack of jurisdiction over the State is not based upon statutory grounds or court determinations, but upon constitutional grounds. Neither the convenience of the litigants nor considerations of judicial economy can serve to override the Constitution; neither should suffice to justify extension of the doctrine of ancillary jurisdiction to permit a suit against a non-consenting State where the State has not waived its sovereign immunity* and where no independent basis for jurisdiction exists.

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*Even if it were assumed that the State's acts in dealing with the Oneidas would constitute a waiver of immunity if the Oneidas were seeking relief from the State, there is simply no reasoned basis for extending such a waiver to the Counties' dealings with the State. It is vital to bear in mind that in these third-party actions for indemnification, the Counties do not stand in the stead of the Oneidas. The Counties' actions are not Indian actions. They are simply actions for money damages as indemnity resulting from an alleged breach of implied warranties. The only forum where such an action may properly be brought is in the New York State Court of Claims. See *Great Northern Life Ins. Co. v. Read*, 322 US 47, 54 (1944).

We submit that in order for a Federal court to obtain ancillary jurisdiction over a State, the State must be independently subject to Federal jurisdiction. In this case, no independent basis for jurisdiction exists. The Counties' third-party complaints should consequently have been dismissed. The issue fully warrants review by this Court.

IV.

Even assuming Federal jurisdiction to hear the Counties' claim, the court's serious misapplication of substantive New York law warrants review by this Court in view of the broad implication of that error.

Finally, and quite aside from the jurisdictional issue, we submit that the Court of Appeals simply erred in holding that the Counties were entitled to any but the relief specifically provided for by the New York law of real property. In relying for its holding upon authorities speaking generally to New York's law of indemnity, the court below wholly ignored the fact that the Counties' actions against the State are essentially an attempt to imply a warranty of title for the conveyance of real property by the State. As such, it was New York's law of real property to which the Court of Appeals should have looked in fashioning a remedy, and the fact that it did not do so constituted serious error. In view of the potential magnitude of that misapplication of New York law, this issue would in itself also warrant review by the Court if Federal jurisdiction were found to exist.

The claims against New York stem from the alleged wrongful act of the State in acquiring Indian lands in violation of the Trade and Intercourse Act and the subsequent conveyance of those lands through mesne to the

Counties in the early 1800s. Nowhere is it alleged that the patents issued by the State contained any covenants. Indeed, the practice of New York was to issue quit claim patents in the early 1800s when those patents must have been issued and such patents were at the sole risk of the purchaser as to the validity of the title granted. See Getman, *Principles and Source of Title to Real Property as Between the State and the Individual and the Relative Rights of Individuals* (1921), p 240. New York law does not recognize an implied warranty of title for real property. See, generally, *Thompson on Real Property*, 1941, Vol 7, p 161, § 3676; see, also, New York State Real Property Law, § 251, which provides that a covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not. Section 251 of the New York State Real Property Law can be traced back to the adoption of the first Revised Statutes. It appears in the Revised Statutes of 1827, Part II, chapter 1, title 2, article 4, section 140.*

In *Burwell v. Jackson*, 9 NY 535 (1854), the Court distinguished between a contract for the sale of real property and a deed of conveyance of property holding that while a contract implies a promise that the seller will convey good title to property a deed does not. The purchaser may refuse the land if there be a defect in title. After this grant is accepted, this right terminates. *Whitemore v. Farrington*, 76 NY 452 (1879), held the same. In *Whitemore*, the Court also held that (p 458):

*Section 140 reads as follows:

> "No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not."

Section 140 was a codification of New York State common law. See *Frost, Cole and Crosby v. Raymond*, 11 Caine 188 (Sup Ct, 1804).

> "Where both parties are innocent of fraud and both know the character and contents of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have exacted, and would have been entitled to exact, a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject the instrument which he accepted. It is beyond the power even of a court of equity to make contracts for parties."

This is in effect what the court below did here.

In *Coffin v. The City of Brooklyn*, 116 NY 159 (1889), this rule was applied with respect to a purchase from the City of Brooklyn. There the Court held there was no cause of action in favor of the grantee against the grantor City because the tax sale, through which the City claimed its rights, was defective. The tax sale in that case is analogous to a patent of lands to which the sovereign has acquired a defective title. In *Coffin*, the Court held that not only was a warranty not implied but the only warranties that could have been made were under existing statutory authority. In the instant case, no statute creating a warranty has even been alleged.

People ex rel. Hall v. Woodruff, 57 App Div 342 (3d Dept, 1901), considers the question of implied covenants in a patent. The court stated the following (p 346):

> "Under this provision, the commissioners issued to the relator letters patent in the form which had been adopted by the board. This form is merely a quitclaim. It contains no covenants, and expressly

provides that 'These Presents shall in no wise operate as a warranty of title.' The effect of these letters patent was to convey to the relator only such interest in the land as the grantor had. There was no implied covenant of warranty, and in case of failure of title the grantee was without any remedy against the grantor. (2 R.S. [9th Ed.] 1812, § 140; *Murray v. Ballou*, 1 Johns. Ch. 577; *Burwell v. Jackson*, 9 N. Y. 541; *Mayor v. Mabie*, 13 *id.* 158.)".

Because of this absence of remedy the Revised Statutes of 1827, Part I, chapter 9, title 5, article 1 (now Public Lands Law, § 6) was enacted which provides that where title to lands patented by the State fails, a claim may be made for the refund of the purchase price to the Commissioner of the Land Office. *People ex rel. Ostrander v. Chapin*, 109 NY 177 (1888), in dealing with this section stated that the refund may be made to the purchaser, his representatives or assignees and further held that the grantee of the original purchaser is an assignee under that section.

It follows, therefore, that no covenant to indemnify arose because of the conveyance by the State and only the statutory rights under Public Lands Law, § 6 are available to the Counties. Under that section a claim may be made for the refund of the purchase price to the Commissioner of General Services (successor to the Commissioners of the Land Office). If satisfied with the facts, the Commissioner may certify this to the Court of Claims. In such a case, the Court of Claims is empowered to award damages to the holder of the patented lands but damages are limited so as not to exceed the purchase price originally paid for such lands. The Counties' remedy in this case is limited to those provided under Public Lands Law, § 6. Any other conclusion would completely upset the law of real property.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
January 25, 1984

Respectfully submitted,

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APPENDIX

83-1240

No.

FILED
JAN 26 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and the County of Oneida, New York and The County of Madison, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A—Decision of the District Court, Dated July 12, 1977.

ONEIDA INDIAN NATION OF N. Y. v. CTY. OF ONEIDA
Cite as 434 F.Supp. 527 (1977)

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs,

v.

The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants.

No. 70-CV-35.

United States District Court, N. D. New York.

July 12, 1977.

Indians brought action against two counties in New York to recover damages for allegedly illegal use of aboriginal land which had been purchased from the Oneida Indians in 1795 by the State of New York in a transaction which allegedly violated the Indian Nonintercourse Act. The District Court, Port, Senior District Judge, held that: (1) good faith in acquiring property will not render good a title which otherwise is not valid for failure to comply with the Nonintercourse Act; (2) purchase

in question was in violation of the Nonintercourse Act; (3) Indians had not abandoned the land; (4) the action was timely; (5) neither state statute of limitations nor state doctrines of laches and adverse possession could serve to render valid a transaction which was otherwise invalid under the Nonintercourse Act; (6) complaint was not required to conform to requirements of state law causes of action, and (7) neither the United States nor the State of New York was an indispensable party.

Order accordingly.

1. Indians ⇐15(1)

Good faith in acquisition of property will not render good a title which is otherwise not valid for failure to comply with the Indian Nonintercourse Act. 25 U.S.C.A. § 177.

2. United States ⇐105

Where case brought in district court challenged validity of 1795 purchase of land from Oneida Indians by the State of New York and sought money damages from two New York counties who currently owned the land and allegedly lacked valid title to the land and where suit in the Indian Claims Commission charged the United States with breach of its fiduciary duty to protect the Oneidas in land dealings with the State of New York, pendency of pro-

ceedings before the Indian Claims Commission did not preclude the district court action. 25 U.S.C.A. § 177.

3. United States ⇐105

Indian Claims Commission is to consider only claims against the United States; there was no intention to supplant Indian claims against other parties, governmental or private, through creation of the Commission.

4. Indians ⇐27(6)

In order to establish prima facie case under the Nonintercourse Act, plaintiff must show that it is or represents an Indian tribe within the meaning of the Act, that the parcels of land at issue are covered by the Act as tribal land, that the United States has never consented to the alienation of the tribal land, and that the trust relationship between the United States and the tribe, which was established by coverage of the Act, has never been terminated or abandoned. 25 U.S.C.A. § 177.

5. Indians ⇐2

Oneida Indian Nation of New York, which is a tribe presently recognized by the Bureau of Indian Affairs, whose members still receive annuities under 1794 Treaty with the Six Nations, and who, along with the Oneida Indian Nation of Wisconsin and

the Oneida of the Thames Band Council, represent direct descendants of the Oneida Indian Nation which inhabited the area in question before and after the passage of the first Nonintercourse Act is a "tribe" within meaning of the Act. 25 U.S.C.A. § 177; Treaty with the Six Nations, 7 Stat. 44.

6. Indians ⇐10

Land which was part of an area reserved for the Oneida Indians in earlier treaty with the State of New York, which was occupied by the Oneidas at the time of the enactment of the first Nonintercourse Act, and which was part of the Oneidas' aboriginal land was covered by the Nonintercourse Act. 25 U.S.C.A. § 177.

7. Indians ⇐15(2)

Evidence that no United States commissioner was present in Albany when the State of New York consummated cession of certain Indian lands, that the federal agent for the Six Nations had earlier traveled to Oneida to dissuade the Indians from dealing with New York, and that there was no subsequent treaty or Act of Congress ratifying the transaction demonstrated that the United States did not consent to 1795 purchase of land from the Oneidas by the State of New York. 25 U.S.C.A. § 177.

8. Indians ⇐3

Termination of congressional responsibility under the Indian Nonintercourse Act must be explicit. 25 U.S.C.A. § 177.

9. Indians ⇐15(2)

Federal policy of removal of Oneida Indians from New York did not affect ratification of purchase of Oneida land by the State of New York as required by the Nonintercourse Act. 25 U.S.C.A. § 177.

10. Indians ⇐15(2)

Treaty of Buffalo Creek which ceded Indian rights in land only in Wisconsin and which made no reference to Oneida land in New York or any mention of 1795 agreement between the tribe and New York State did not constitute approval of the United States for 1795 purchase of land from the Oneidas by the State of New York. 25 U.S.C.A. § 177; Treaty of Buffalo Creek, Art. I, 7 Stat. 550.

11. Indians ⇐15(2)

Opinion of the Court of Claims which merely decided which Indians would participate in award of damages for disposition of reservation land in Kansas did not establish either federal ratification of 1795 purchase of land from Oneida Indians by the State of New York or abandonment of the New York land by the Oneidas. 25 U.S.C.A. § 177.

12. Indians ⇐15(2)

Evidence that Oneidas are a federally recognized Indian nation and that members of the tribe continue to receive annuities under 1794 Treaty with the Six Nations demonstrated that United States had never terminated or abandoned its trust relation-

ship with the United States so that purchase of Oneida land by the State of New York was required to receive federal approval. 25 U.S.C.A. § 177; Treaty with the Six Nations, 7 Stat. 44.

12. Indians ⇐3

Nonintercourse Act does not exempt from its coverage states having a right of preemption. 25 U.S.C.A. § 177.

14. Indians ⇐15(1)

Purchase by the State of New York of land from the Oneida Indians in 1795 was in violation of the Nonintercourse Act and thus void. 25 U.S.C.A. § 177.

15. Indians ⇐15(1)

Oneida Indians who had never abandoned their claim to their aboriginal homeland and who never acquiesced in the loss of their land but rather continued to protest its diminishment had not abandoned land which was purchased from them by the State of New York in 1795 in violation of the Nonintercourse Act. 25 U.S.C.A. § 177.

16. Indians ⇐27(4)

Action brought by Oneida Indians to recover damages for allegedly illegal use and occupancy of a part of their aboriginal land by two counties and which was commenced within the time permitted by statute governing actions brought by the United States for or on behalf of Indian tribes was not time barred even though the land was purchased from the Indians, allegedly

in violation of the Nonintercourse Act, by the State of New York in 1795. 25 U.S.C.A. § 177; 28 U.S.C.A. § 2415.

17. Indians ⇐27(4)

Statute of limitations governing actions brought by the United States for or on behalf of Indian tribes applies to a case brought by Indian tribes in their own behalf to recover damages for allegedly illegal use of aboriginal land. 28 U.S.C.A. § 2415.

18. Indians ⇐27(4)

State statutes of limitations and state laws of adverse possessions and laches do not bar suit brought by the United States on behalf of an Indian nation; where the United States holds title to land in trust for Indians, adverse possession cannot run against the land.

19. Indians ⇐15(1)

Where individual Indians sue to rescind transfers of restricted Indian land, state defenses cannot render the transactions effective.

20. Indians ⇐15(1)

If transfer of Indian land is void under a federal law, such as the Nonintercourse Act, it cannot later be made valid by operation of state law. 25 U.S.C.A. § 177.

21. Indians ⇐15(1), 27(4)

New York statute of limitations, doctrine of laches, doctrine of adverse possession, or doctrine of bona fide purchaser, could not validate 1795 purchase of land

from the Oneida Indians by the State of New York in violation of the Nonintercourse Act. 25 U.S.C.A. § 177.

22. Federal Civil Procedure ⇐219

United States was not an indispensable party to action brought by Oneida Indians against two counties of New York to recover damages for allegedly illegal use of aboriginal land which had been purchased by the State of New York from the Oneidas in 1795 in violation of the Nonintercourse Act. 25 U.S.C.A. § 177; Fed.Rules Civ.Proc. rule 19, 28 U.S.C.A.

23. Federal Civil Procedure ⇐219

State of New York was not an indispensable party in action brought against two New York counties by Oneida Indians to recover damages for allegedly illegal use by the counties of Indian aboriginal land which had been purchased from the Oneidas in 1795 by the State of New York in a transaction which was in violation of the Nonintercourse Act. 25 U.S.C.A. § 177; Fed.Rules Civ.Proc. rule 19, 28 U.S.C.A.; County Law N.Y. § 215.

24. Counties ⇐183

Land which is held by county in New York is not held merely by the county as an agent for the State. County Law N.Y. § 215.

25. Federal Civil Procedure ⇐673

Under the Federal Rules of Civil Procedure, question is not how plaintiff has characterized the form of the action but rather whether plaintiff is entitled to relief. Fed. Rules Civ.Proc. rule 54(c), 28 U.S.C.A.

26. Indians ⇐27(5)

Complaint and proof in action brought by Oneida Indians to recover damages for allegedly illegal use of aboriginal land which had been purchased by the State of New York in 1795 in a transaction which violated the Nonintercourse Act were not required to meet requirements of state law forms of action. 25 U.S.C.A. § 177.

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MEMORANDUM DECISION AND ORDER

POOLE, Senior District Judge.

This case tests the consequences of the failure of the State of New York to comply with the provisions of the Indian Nonintercourse

course Act, enacted by the first Congress in 1790 and reenacted in substance by subsequent Congresses to the present date. 25 U.S.C. § 177. Familiarity with the prior opinions in the case is assumed.[1]

In 1795, the State of New York acquired from the Oneida Indians, by an instrument variously denominated as a deed or treaty, 100,000 acres in Central New York. The counties of Oneida and Madison have acquired and now occupy undesignated but small portions of that acreage. The claim made in this case is limited to damages for the use and occupancy during the years 1958 and 1959 of those "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements."[2]

The issues can be summed up as follows: (1) Have the plaintiffs established that the transfer of land by the 1795 treaty to the State of New York was in violation of the Nonintercourse Act? (2) Have any of the defenses asserted by the defendants been established? (3) Are the defendants liable to the plaintiffs for damages resulting from defendants' use and occupancy of part of the subject land during 1958 and 1959? The answer to the first question is yes; to the second, no; and to the third, yes.

[1] Although the present owners of the 100,000 acres may have acted in good faith

1. Oneida Indian Nation v. County of Oneida, 70-CV-35 (N.D.N.Y. November 9, 1971), aff'd. 434 F.2d 916 (2d Cir. 1972), rev'd, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

2. Plaintiffs' amended complaint ¶ 22.

when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 689 (9th Cir. 1976). Furthermore, it is incumbent upon "[g]reat nations, like great men, [to] keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S.Ct. 543, 567, 4 L.Ed.2d 584 (1960) (Black, J., dissenting).

The posture in which this case has been presented is reminiscent of *United States v. Furness*, 125 F.2d 929 (3d Cir.), cert. denied, 316 U.S. 694, 62 S.Ct. 1283, 86 L.Ed. 1754 (1942), in which the Second Circuit said:

> Although there is directly before us only one lease, on which the annual rent is but $4, the question is of greater importance because the Nation, by resolution, has cancelled hundreds of similar leases.

Id. at 930. Likewise, the impact of the Oneidas' claim will reach far beyond the boundaries of the present suit. In my initial decision dismissing the claim for lack of jurisdiction, I pointed out that, "It obvious that there are, of necessity, numerous other

portion occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom . . . claims could be made." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 9 n. 3 (N.D.N.Y., November 9, 1971).

Nor is the problem limited to this case,[5] this particular land transaction, the Oneida Indian Nation, or even this area. Other Indian tribes have similar claims[4] in several other states. Litigation brought by the tribes themselves,[5] or by the federal government in their behalf,[6] is already pending. Further suits brought by the

5. The Oneida Nations presently have two other actions pending in this district. *Oneida Indian Nation v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging some 35 treaties with New York State); *Oneida Indian Nation v. Williams*, 74-CV-187 (N.D.N.Y.) (action for ejectment against 33 landowners).

4. These Indian claims have not all been pursued through the orderly mechanism of litigation. *See New York v. White*, 528 F.2d 336 (2d Cir. 1975). White arose out of the seizure of land in the Adirondacks by members of the Mohawk and other Indian tribes.

5. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass.1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn.1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I.1976).

6. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

United States are imminent. The Department of Justice has alerted the United States Marshal for this district that, unless Congress extends the statute of limitations for such suits beyond July 10, 1977,[7] an action on behalf of the Cayuga and St. Regis Mohawk tribes will be commenced immediately. The Marshal was given this advance notice because it is anticipated that the suit will involve some 10,000 defendants. The potential for disruption in the real estate market is obvious and is already being felt. News reports indicate that title companies have refused to insure titles in areas where Indian land claims exist, even if law suits have not yet been commenced.

[1, 2] The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles. This in no way is intended to be critical of the plaintiffs' conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means—but to no avail. The aid of the United States as guardian has been sought for the purpose of instituting claims against the State of New York, to challenge not only the 1795 sale but other treaties with the state.[8] The remedy afforded by

7. *See* 28 U.S.C. § 2415.

8. *See* Tr. 186-87; Exhs. 46-48, 51. The parties have advised the court that the United States plans to institute a suit on behalf of the Oneidas to prosecute the tribe's land claims. *Compare, Passamaquoddy, supra* note 6.

Congress against the United States for alleged breach of trust has been and is presently being pursued before the Indian Claims Commission.[9] Finally, it is within

9. The progress of the Oneidas' action in the Indian Claims Commission can be ascertained by reference to the opinions of the Commission. *See* 26 Ind.Cl.Comm. 138 (Aug. 18, 1971), 27 Ind.Cl.Comm. 592 (Mar. 19, 1972), and the intervening opinion of the Court of Claims, *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 548 (1973).

In their answer, defendants raised as an affirmative defense the pendency of proceedings before the Indian Claims Commission. They allege that, "[t]his issue is presently before the Commission." Defendants' answers ¶ 11. The simple rejoinder to this defense is that the same issue is not before this court and the Commission. The case at bar challenges the validity of the 1788 purchase of Oneida land; it seeks money damages from the defendants, present landowners who allegedly lack valid title to the land. The suit in the Indian Claims Commission charges the United States with breach of its fiduciary duty to protect the Oneidas in land dealings with the State of New York. *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Ct. 548 (1973). Although these are separate claims, recovery against the United States might well render any other suit academic.

A more important question, whether the Indian Claims Commission was created to provide an exclusive remedy for redress of wrongs to the Indian nations, was not raised by defendants but deserves comment. The Indian Claims Commission was created in 1946 "to right a continuing wrong to our Indian citizens". H.R.Rep.No.1466, 79th Cong., 2d Sess. (1946), 1946 U.S.C.C.A.N. 1347, by creating a forum for Indian claims against the United States. The legislative history makes clear that

the power of Congress to dispose of the matter under the constitutional delegation of power.[10]

The opinion of what was recently said by Chief Judge Kaufman is striking. "As in so many cases in which a political solution is preferable, the parties find themselves in a court of law." *British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75 at 76 (2d Cir. 1977).

I. NATURE OF THE PROCEEDING

The Oneida Indian Nation are suing for damages arising from the allegedly illegal use and occupancy of a part of their aboriginal land. In 1795, the State of New York purchased a large tract of the aboriginal land of the Oneida Nation. Plaintiffs claims that this purchase violated United States treaties and the Indian Nonintercourse Act, 25 U.S.C. § 177. Therefore,

the Commission was to consider only claims against the United States; no intent to supplant Indian claims against other parties, governmental or private, is evidenced. In discussing the nature of the claims to be considered by the Indian Claims Commission, the House Report mentions solely claims against the federal government. *See Id.* Section I; 1946 U.S.C.C.S. 1350-51.

10. *See* U.S.Const. art. I, § 8; *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

plaintiffs contend that the purchase was void and of no effect.

Part of the 1795 purchase is now occupied by the defendant counties. Plaintiffs measure their damages by the fair rental value of such land for the years 1968 and 1969, the period covered by the complaint.

II. BACKGROUND

The action was commenced in 1970. Following a motion for summary judgment by the defendants, this court dismissed the action for lack of federal jurisdiction. It was decided that diversity of citizenship was absent, 28 U.S.C. § 1332, and that federal question jurisdiction was lacking because the case did not "[arise] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a). This court held that the federal question failed to appear on the face of the complaint; it only appeared in anticipation of various defenses. The Court of Appeals affirmed, holding that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule." *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972). However, the Supreme Court reversed, stating that plaintiffs'

> assertion of a federal controversy . . . rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 677, 94 S.Ct. 772, 783, 39 L.Ed.2d 73 (1974). Because the "Oneidas assert a present right to possession based in part on their aboriginal right of occupancy", *id.*, the complaint on its face raises a federal question.

After remand, plaintiffs moved for summary judgment, but the motion was denied summarily. I hold that summary judgment was inappropriate in such a complex and far-reaching case; a full exploration of all the facts was in order. However, trial of the issues was bifurcated. The parties agreed to try the issue of liability first, reserving the question of damages and that of liability of the State of New York to the defendant counties for later disposition.[1] Subsequently, the plaintiffs developed their proof, largely through documentary exhibits, in a three day trial. The defendants, relying only on the plaintiffs' proof and the law, submitted no evidence.

III. FACTS

The Parties

Originally, there were two plaintiffs, the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin. During the trial, plaintiffs moved to amend their complaint to join the Oneida of the

1. Transcript (Tr.) 8-9.

Thamos Band Council, a band of Oneidas from Ontario, Canada, as party plaintiffs. The motion was granted.

The three plaintiffs are the direct descendants of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War. According to expert testimony, this conclusion is supported by extensive research into the kinship and genealogies of the Oneida Nation. (Tr. 63-66, 102 65). Furthermore, the United States is presently paying annuities, which are owed to the Oneida Nation under the Treaty with the Six Nations, executed on November 11, 1794, to the Oneidas in New York and Wisconsin. The Wisconsin Oneidas receive their payments in cash, and the New York Oneidas in cloth. (Tr. 25-26). Also, the Bureau of Indian Affairs recognizes both the Wisconsin and New York Oneidas as the successors in interest to the Oneida Nation of 1794. (Tr. 26, Exh. 49).

This finding is not disturbed by defendants' allegations that the present leadership of the Oneida Nation of New York is in dispute. Regardless of which individuals hold office within the tribe, the tribe is recognized as the direct descendant of the Oneida Nation which inhabited New York 200 years ago. Nothing else is required.

The defendants are the Counties of Oneida and Madison. The parties agree that the defendants now occupy and claim to be the record owners of part of the aboriginal Oneida land, more specifically, part of that area of Oneida land purchased by New York State in 1795.

Historical Background

The Oneidas' aboriginal land ran from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. (Tr. 60). This region can be described as a band, about fifty miles wide, running north-south through eastern central New York. According to the records of the earliest white missionaries who came to upstate New York, the Oneidas were occupying this land during the early 17th Century. (Tr. 60, 127). They continued to occupy this land until shortly after the birth of the United States.

During the Revolutionary War, the Oneidas fought alongside the Colonists against the British. (Tr. 72). Aside from their service as scouts and their active participation in various battles in upstate New York, the Oneidas performed another valuable function for the Colonies—they prevented the Six Nations or Iroquois from taking a unified stand as allies of the British. (Tr. 73). The Iroquois were the most influential and powerful tribe in the Northeast and had traditionally been an ally of the British.[13] At the outset of the Revolutionary War, the Colonial government sought to secure the neutrality of the Iroquois. Although this result was not achieved, at least

13. *See F. Cohen, Handbook of Federal Indian Law* 417-418 (University of New Mexico Press reprint of 1942 Ed.) (hereinafter, *Federal Indian Law*).

the Iroquois did not fight in unison against the Colonists. Because the Oneidas and Tuscaroras allied themselves with the Colonists, the Six Nations put out the war hatchet and permitted each nation to choose its ally independently.

After the War, the new nation sought to reward and protect its valuable ally, the Oneida Nation. The Treaty of Fort Stanwix, executed in 1784 to make peace with the Six Nations, expressly secured the Oneidas "in the possession of the lands on which they are settled." (Exh. 1).[13] A few years later, in further thanks for their help, the federal government commissioned, post facto, several Oneidas as officers in the United States Army. (Tr. 68, Exh. 11). Twice again, in treaties between the Six Nations and the United States, the federal government secured the Oneidas in the possession of their land.[14]

However, in 1788, because of increasing pressures to open up the Oneidas' land to settlement, the State of New York purchased the great majority of the Oneidas' land from them. They were left with a reservation of about 300,000 acres in the area southwest of Oneida Lake. This reservation is outlined in Exh. 7 and the parties have stipulated that the land involved in

13. Treaty of Fort Stanwix (October 22, 1784) 7 Stat. 15.

14. Treaty at Fort Harmar (January 9, 1789) 7 Stat. 33 (Exh. 3); Treaty with the Six Nations (November 11, 1794) 7 Stat. 44 (Exh. 4).

this suit lies within the boundaries of this 1788 reservation.

In 1790, Congress passed the first Indian Nonintercourse Act (the Act). That statute prohibited any land transactions with Indian tribes that were not executed by public treaty under the authority of the United States. 1 Stat. 137-38 (Exh. 10). In 1793, the Act was amended into substantially its present form. The gist of the Act remains the same—unless by treaty with the United States or under the authority of the United States, no purchase or grant of land from an Indian tribe "shall be of any validity." 25 U.S.C. § 177.

The 1795 Purchase

By 1795 a conflict had developed between the United States and the State of New York over the State's power to negotiate purchases of land from the Oneidas. The federal policy toward the Oneidas remained the same—the government intended to reward them for past services and to protect them from predation by the white settlers. (Exhs. 17, 18). New York, however, desired to purchase the Oneidas' land, along with the land of many other Indian nations within its borders. Secretary of War, Timothy Pickering, wrote to United States Attorney General William Bradford for an opinion on whether or not New York had the power to purchase Indian land without the intervention of the United States government. The Attorney General responded by ruling the

language of the Nonintercourse Act was "too express to admit of any doubt upon the question." (Exh. 22). The Act applied to New York. In his opinion Bradford did not question New York's right to land ceded to the State by treaty entered into prior to the adoption of the Constitution of the United States. However, as to the land reserved to the Oneidas under those treaties, he held that the Oneidas' rights could not be extinguished except "by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." (Id.)

Pickering had been informed that New York was attempting to purchase land from the Cayuga, Onondaga and Oneida Nations. In June of 1796, he wrote to Israel Chapin, Jr., Superintendent of the Affairs of the Six Nations, ordering him not to aid New York in these purchases. Chapin was further instructed to warn the Six Nations of the illegality of any such transactions with New York. Finally, noting that New York's Governor Clinton refused to request federal commissioners, Pickering hoped that the situation would improve when the new governor, John Jay, took office. (Exh. 24). The hope remained only a hope. In July, Jay wrote Pickering that, "on this occasion I think I should forbear officially to consider and decide" whether the "Act of 1 March 1793" was constitutional or whether the conduct of New York violated either the United States Constitution or the 1793

Nonintercourse Act. He observed, however, that under the New York Constitution, transactions with Indian tribes must be pursuant to acts of the Legislature; that the enabling legislation in this instance was silent "[a]s to any intervention or concurrence of the United States", nor did it "by implication direct or authorize the Governor to apply for such intervention." (Exh. 25). Jay noted that arrangements for the meeting with the Six Nations planned for later that summer were finished "before I came into office." (Id.)

Within a week, however, Jay wrote Pickering and requested the appointment of United States Commissioners to negotiate a treaty between New York and the St. Regis Indians. (Exh. 26). In a letter to President Washington, suggesting that a commissioner be appointed for the treaty with the St. Regis, Pickering pointed out New York's inconsistent policy for negotiating with Indians. The State was complying with statutory requirements for the St. Regis, but refused to do so when dealing with the Six Nations. (Exh. 27). The reasons for these differing approaches are nowhere made specific. However, Dr. Jack Campisi, a professor of anthropology and an expert on the Oneida Nations, suggested why New York acted as it had. He stated that New York perceived a difference in federal treatment of different Indian tribes. Since the Oneidas and the United States had been allies, the federal government felt bound to protect their interests. Tribes that had allied

with the British received less federal protection. Consequently, New York complied with the Nonintercourse Act when negotiating with previously hostile Indians, but refused to do so when dealing with the friendly Oneidas. The State feared excessive federal protective intervention in the latter case.

In July, New York purchased the Cayuga and Oneida reservations for sums to be paid annually. The tribes were left with small parcels of land. (Exh. 31). When the New York Commissioners then moved on to the Village of Oneida, intending to purchase the Oneidas' land, Chapin travelled to Oneida hoping to dissuade the Indians from dealing with the State. (*Id.*). At Oneida, he informed the tribe of the federal government's opinion of the illegality of such a transaction. (Exh. 32). He remained there for nine days and no deal was made. After leaving Oneida, Chapin was informed that the state commissioners left two days later, having been unable to reach any agreement with the tribe. (*Id.*). Late in August, Pickering wrote Chapin and informed him that he had acted properly in warning the Oneidas of the illegality of any purchase by New York. However, Pickering then told Chapin that "having done this much, the business might there be left." (Exh. 33). Chapin was instructed to leave matters as they stood.

Despite another letter from Pickering to Governor Jay, outlining the procedure to be followed under the Nonintercourse Act of

1793 (Exh. 34), the State continued to negotiate with the Oneidas. These negotiations culminated in a sale contrary to the provisions of the Act on September 15, 1795 by the Oneidas of approximately 100,000 acres of their reservation. (Exhs. 6, 35). The papers transferring the land were signed at Albany, which was not within the boundaries of the Oneidas' aboriginal land. (Exh. 35). Although the Six Nations had met with the British at Albany, the Oneida Nation had never before executed any treaty or land transaction there. (Tr. 111a-112a).

Another irregularity in the transaction appears from the record. Ordinarily, treaties were entered into by tribal consensus (Tr. 109-10), by unanimous decision of the tribe. In this case, powers of attorney were executed enabling certain individuals, many of them chiefs, to negotiate the transaction at Albany. (Tr. 190). Also, although women were not allowed to speak at the tribal council (Tr. 190), half of those Oneidas signing the power of attorney were women. (Tr. 188). Finally, the names of the sachems and chiefs that appear on the September 15, 1795 document were not the signatures of Oneida chiefs. Rather, the signatories of the documents merely used the traditional Oneida names for their sachems and chiefs. (Tr. 196).

In the opinion of Dr. Campisi, no United States Commissioner was present in Albany when the State purchased this land from the Oneidas. (Tr. 126). Superintendent

Chapin's expense account shows no expenses incurred in Albany in September of 1795. (Exh. 36). Defendants have presented no evidence demonstrating or even suggesting that a United States Commissioner was present. There is no record that Governor Jay ever requested a commissioner for this transaction. The only finding permitted by the record before me is that no United States Commissioner or other official of the federal government was present at the September 15, 1795 transaction.

Developments after 1795

After 1795, New York State continued to negotiate with the Oneidas for the purchase of their land. Between 1795 and 1846, 26 treaties were executed between the State and the Oneida Nation. Only two of these treaties were conducted under federal supervision as required by the Nonintercourse Act.[10] By 1846, the Oneidas' landholdings in New York had been diminished to a few hundred acres. (Tr. 267).

The social and economic pressures on the Oneidas naturally resulted in the alienation of their land. (Tr. 127 181). In addition, white settlers living in the areas continuously encroached on the Oneidas' land. (Tr. 232 233). Land speculators were always urging the Oneidas to sell their reservations. At the same time, New York began agitating for the removal of the Oneidas and other

10. *See United States v. Oneida Nation of New York*, 477 F.2d 939, 941 (2d Cir. 1973).

Indians to western lands.[11] The policy of removal was not universally accepted among the Oneidas, and the problem was exacerbated by the efforts of missionaries, clergy and reformers, to urge the Oneidas to move west. (Tr. 181). The Oneida Nation was split into several factions by these pressures. As a result, by the 1840's, three distinct bands of Oneidas existed. One band stayed on the remaining Oneida reservation land in New York; one group of almost 800 had settled on about 65,000 acres in Wisconsin; and another group of about 600 had moved to Ontario, Canada.

Unfortunately, the pressures on the Oneidas to part with their land did not cease once removal had been effected. The Oneidas' meager landholdings in New York were reduced further as a result of a New York statute which divided the tribal landholdings and gave the Oneidas an option to sell their land. (Tr. 267). This option to sell, coupled with the state of extreme poverty in which they lived, more or less forced the sale of much of the remaining Indian land. The loss of land in Wisconsin was much more drastic. In 1887, the Dawes Act, or General Allotment Act, was enacted by Congress. (24 Stat. 388, February 8, 1887). This Act broke up tribal landholdings, distributed individual parcels to individual Indian families, and removed restrictions on the transfer of title.[12] Again, because of the poverty of the Oneidas, they

12. *Federal Indian Law* 630.
13. *Id.* at 630 n.

than lost their land through sales, tax sales, or mortgage foreclosures. By the time of the depression, the extent of the Wisconsin Oneidas' landholdings had decreased from 65,000 acres to approximately 800. (Tr. 188, 215, 236).

Those forces which acted to deprive the Oneidas of their land had a similar adverse impact on the social conditions of the Oneida Nation. After the Revolutionary War, the Oneida Nation was extremely disorganized because of the displacements which had occurred during the many years of fighting, first against the French and later against the British. (Tr. 186). The tribe was suffering from famine and widespread alcoholism. (Tr. 186). The poverty they were experiencing became linked in a vicious circle with the loss of their land. These problems were complicated by the Oneidas' illiteracy. Prior to 1838, at the time the great mass of their land was lost, only a few Oneidas had even a minimal ability to converse English orally. (Tr. 188). None could read or write. This state continued through the early 1840's, during the years of removal. (Tr. 215). In fact, up through the 1850's, a translator was needed at meetings of the Oneida Nation of Wisconsin in order to explain actions of the federal government. (Tr. 236). The missionaries' attempts to educate the Oneidas met, in retrospect, no failures. There were schools established by missionaries on the New York reservation by 1796 and on the Wisconsin land by 1829. (Tr. 264).

However, these schools had little or no impact on the Oneidas' illiteracy. It was not until 1928 that the first person graduated from the eighth grade from the mission school for the Oneidas in Wisconsin. (*Id.*)

Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. (Tr. 264). Usually, such petitioning was conducted through the Oneidas' Indian agent. On one occasion, in 1874, a group of Oneidas traveled from Wisconsin to Albany, New York and consulted with a private law firm. All of these efforts were to no avail. (Tr. 234-36). Between 1909 and 1966, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances. (See Exhibits 54, 55).

IV. PLAINTIFFS' CLAIM

The plaintiffs' claim is uncomplicated. The complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 1790's

and 1795's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States[18] and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the Indians' right to possession under the federal treaties[19] and the applicable federal statutes. Also alleging that the 1795 cession was for an unreasonable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1958, through December 31, 1969.

18. *See* notes 13 and 14 *supra*.

19. Plaintiffs claim relief under both the Treaty and the Nonintercourse Act. Since relief is afforded under the statute, it is unnecessary to decide whether the plaintiffs are afforded a claim against these defendants for the alleged treaty violation.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 663 65, 94 S.Ct. 772, 775, 39 L.Ed.2d 73 (1974) (footnote omitted).

V. NONINTERCOURSE ACT VIOLATION

Since its enactment in 1790 to the present time, the Nonintercourse Act has not materially changed. It is now codified at 25 U.S.C. § 177. It provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

[4] *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass.1977) (*Mashpee*), is an action similar to this case. The

plaintiff tribe seeks a declaratory judgment establishing its right to certain land in Massachusetts allegedly obtained from it in violation of the Nonintercourse Act. In addressing a motion to dismiss the complaint, the court stated that in order to establish a prima facie case,

> . . . plaintiff must show that:
> 1) it is or represents an Indian "tribe" within the meaning of the Act;
> 2) the parcels of land at issue herein are covered by the Act as tribal land;
> 3) the United States has never consented to the alienation of the tribal land;
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

Id. at 932.

In considering these four factors, attention will focus principally upon the facts relating to the Oneida Indian Nation of New York.[20]

[5] The Oneida Indian Nation of New York has clearly established itself as a tribe within the meaning of the Nonintercourse Act. It is a tribe presently recognized by the Bureau of Indian Affairs.[21] The New York Oneidas still receive annuities under the 1794 Treaty with the Six Nations.[22]

20. Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.

21. Tr. 36.

22. Tr. 35-36.

Furthermore, they, and the other plaintiffs as well, are the direct descendants of the Oneida Indian Nation which inhabited the area in question before and after the passage of the first Nonintercourse Act. The Act was intended to protect the Oneida Nation. *See Joint Tribunal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

[6] The land involved is covered by the Act. The land purchased in 1795 was part of an area reserved for the Oneidas in an earlier treaty with New York State and occupied by them at the time of the enactment of the first Nonintercourse Act. The tract was part of the Oneidas' aboriginal land. The Supreme Court has specified that Indian title in their aboriginal land is entitled to federal protection. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-68, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Furthermore, this land was secured to the Oneidas in three treaties with the United States, including the 1794 Treaty with the Six Nations.[23] The aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government, is certainly land covered by the Nonintercourse Act, 25 U.S.C. § 177. Therefore, a fiduciary relationship exists between the plaintiffs and the United States. *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 559 (1973).

[7] The proof clearly establishes that the United States never consented to the

23. See notes 12 and 14 supra.

1795 purchase. No United States commissioner was present in Albany when New York commissioned this session.[26] In fact, the federal agent for the Six Nations, Israel Chapin, *Jr.*, had earlier traveled to Oneida to dissuade the Indians from dealing with New York. No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The federal consent required by the Nonintercourse Act was not obtained before or after the fact.

[6, 7] Defendants argue that federal consent to this purchase was manifested by the subsequent conduct of the United States government. Defendants first raise the broad claim that the federal policy of removal of the Indians[27] validated the 1795 transfer. This broad argument misconceives the nature of Congressional approval required. Termination of Congressional responsibility under the Nonintercourse Act must be explicit. "[A]ny withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." *Passamaquoddy, supra*, 638 F.2d at 380 (footnote omitted). *See also United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Adoption of defendants' argument would emasculate the Nonintercourse Act. The policy of removal, in and of itself, did not effect ratification. Neither did the

26. *See* text *supra* at 13–15.

27. *See Federal Indian Law* 420.

government's alleged awareness of subsequent transactions between the Oneidas and New York State, *see United States v. Oneida Nation of New York*, 477 F.2d 939, 954 Ct.Cl. 546 (1973), constitutes a ratification of the 1795 purchase. Again, defendants can point to no "plain and unambiguous" expression of federal approval.

Defendants rest on the 1838 Treaty of Buffalo Creek[28] and its treatment in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898), "as explicit recognition and implicit ratification"[29] by Congress of the 1795 purchase, among others. They see a mirage rather than an oasis. The federal government's policy of removal began affecting the Oneidas shortly after 1838. Initially, some Oneidas moved to Wisconsin, where they received a large tract of land ceded by the Menominee and Winnebago tribes.[30] Other Oneidas moved to Canada.[31] The Wisconsin land with some exception was later "sold[d] and relinquish[ed] to the United States" in exchange for a large tract of land in Kansas. Treaty of Buffalo Creek, Article I, 7 Stat. 551.

28. Treaty of Buffalo Creek (January 15, 1838) 7 Stat. 550.

29. Defendant County of Madison's Post-Trial Memorandum 34.

30. *See Federal Indian Law* 420

31. Tr. 130–34, 150–65.

[10, 11] An examination of the Buffalo Creek Treaty and the *New York Indians* case fails to support the defendants' interpretation. On its face, the Treaty of Buffalo Creek ceded Indian rights in land in Wisconsin only; no mention was made of Oneida land in New York State. Neither is there any mention of the 1795 agreement with New York. This is a particularly significant omission in view of the strenuous efforts made by the United States through President Washington and Secretary of War Pickering to enforce compliance with the Nonintercourse Act. (*See* Exhs. 17, 24). In light of the diametrically opposed views of the Governor of New York and the Central Government as to the applicability of the Nonintercourse Act to the 1795 transaction, (*compare* Exh. 22 *with* Exh. 26), it is hardly likely that the Treaty of Buffalo Creek would have ratified the agreement implicitly instead of expressly. Had there been a desire to legitimatize a transaction theretofore regarded as a contravention of the Nonintercourse Act, the opportunity was presented without question by the Treaty of Buffalo Creek. Article 13, headed "Special Provisions for the Oneidas Residing in the State of New York", 7 Stat. 554, not only presented a logical and convenient place for such a provision, but even suggested it if the parties, in fact, had it in mind. Furthermore, there was resistance among the Oneidas to the removal policy initially,[30] and to the arrangements specified in the Treaty of Buffalo Creek. This

30. Tr. 130-32.

resistance to removal was a factor that brought about the dispute resulting in the *New York Indians* case.

> The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them [in Kansas].

New York Indians, supra, 170 U.S. at 28, 18 S.Ct. at 538.[31]

In a similar context, the Supreme Court refused to infer that Congress extinguish

31. Defendants' assertion that the Court of Claims' opinion in *New York Indians v. United States*, 40 Ct.Cl. 448 (1905), established either federal ratification of the 1795 purchase or abandonment of the Oneidas' New York land is equally unsupportable. That opinion merely decided which Indians would participate in the award of damages for the disposition of their reservation in Kansas. The right to such damages had been established by the Supreme Court in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898). The Court of Claims held that the Ontario Oneidas were entitled to share in the recovery. At no point did the court find that the New York Oneidas had abandoned their rights to their land in New York. In discussing the unsuccessful nature of the Treaty of Buffalo Creek, the Court noted that:

> None of the tribes moved or was removed to the country set apart; none of them made a demand or request for removal; some of them positively refused to remove when requested by agents and commissioners of the United States; others of them denied that they were parties to the treaty and averred that it had been procured in their names by corruption and fraud.

New York Indians v. United States, 40 Ct.Cl. 448, 451 (1905).

the Walapais Indians' rights in their aboriginal land when it established a new reservation for the Walapais and other Indian tribes.

> We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, [32 S.Ct. 565, 569, 56 L.Ed. 941], the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353–54, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941) (footnote omitted).

[12] The fourth element is proof that the trust relationship between the Oneidas and the United States was never terminated or abandoned.[32] The uncontradicted evi-

32. The essential elements of a prima facie case under the Nonintercourse Act trace their ancestry to *Passamaquoddy*, *supra*. *See Mashpee*, *supra*, 427 F.Supp. at 902. Obviously, this fourth element was essential to plaintiffs' claim in *Passamaquoddy*, for the main issue there was whether a trust relationship existed between the United States and the Passamaquoddy tribe. Although I entertain doubts as to the need for proof of this element in an action brought by the tribe itself, the question is academic in this case since the trust relationship between the United States and the Oneidas has clearly never been terminated or abandoned.

dence establishes that this is so. The Oneidas are today a federally recognized Indian nation.[33] Furthermore, they continue to receive annuities under the 1794 Treaty with the Six Nations.[34] Defendants have introduced no evidence whatsoever of any plain and unambiguous withdrawal of Congress' trust obligations. See *Passamaquoddy*, *supra*, 528 F.2d at 380.

A prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established.

[13, 14] Two additional points urged by the defendants should be noted. In reliance on *United States v. Franklin County*, 50 F.Supp. 152 (N.D.N.Y.1943), defendant County of Oneida construes the Nonintercourse Act as exempting from its coverage states "having a right of preemption", such as New York. In the light of later decisions, this holding of *Franklin County* cannot be considered authoritative. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent shall apply in all of the states including the original

33. Tr. 26, Exh. 49.

34. Treaty with the Six Nations (November 11, 1794) 7 Stat. 44. *See* Tr. 25–26.

13." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670, 94 S.Ct. 772, 778, 39 L.Ed.2d 73 (1974); **see also** *United States v. Oneida Nation of New York*, 477 F.2d 939, 943 44, 201 Ct.Cl. 646 (1973); *Seneca Indian Nation v. New York*, 397 F.Supp. 683 (W.D.N.Y.1975).

Franklin County's description of the Act as "at most regulatory, designed to prevent fraud", *Franklin County, supra*, 50 F.Supp. at 156, and that conclusion that the Act, by its terms, does not require the presence of a United States Commissioner at a treaty as "a prerequisite to its validity", *Id.*, is also urged. The plaintiffs contend that a purchase of land in violation of the act is totally void, whether the Indian nation was defrauded or whether the consideration paid for the land was inadequate.[38] The language of the statute and cases which consider other transfers of restricted Indian land compel the conclusion that the statute renders the 1795 purchase void.

The Nonintercourse Act states that no purchase of Indian land, unless made by treaty or convention pursuant to the Constitution, "shall be of *any validity* in law or equity." 25 U.S.C. § 177 (emphasis added). Any person not employed or authorized by the United States Government who even

38. At a pre-trial conference, it was stipulated that inadequacy or lack of consideration is not relevant to either plaintiffs' claims or defendants' affirmative defenses, insofar as issues of liability are concerned. This stipulation does not extend to the damages phase of the trial. (Tr. 7).

attempts to negotiate such a purchase can be fined. *Id.* The language of Congress is plain. The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned.

When Indian land has been transferred contrary to the terms of Congressional enactment, the Supreme Court has not hesitated to void the transaction. In *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923), a Cherokee Indian leased his land in violation of Congressional restrictions. The Court held the lease void and further held that an Oklahoma statute creating a tenancy-at-will was invalid as applied to the land. In *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922), a Quapaw Indian sold allotted land in accordance with a statute permitting alienation but prohibiting any person such as the purchaser, an Indian agent, from having "any interest or concern in trade with the Indians." Rev. Stat. § 2078. The Court held the purchase void and remanded for an accounting. 259 U.S. at 138, 42 S.Ct. 442. *See also Smith v. McCullough*, 270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926). A recent case in the Ninth Circuit concluded that the Nonintercourse Act prohibited the Walker River Paiute Tribe from granting an easement to a railroad. *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). In 1882, the railroad's predecessor

negotiated with the Tribe and bought a right-of-way across its reservation without Congressional authorization. Ninety-four years later the agreement was held invalid.[36]

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

Id. at 699.

The result in the present case may seem equally harsh. Nevertheless, it is the result mandated by the Nonintercourse Act.

VI. ABANDONMENT

[15] Defendants argue that the plaintiffs abandoned the land involved in this suit, citing *Williams v. City of Chicago*, 242 U.S. 434, 37 S.Ct. 142, 61 L.Ed. 414 (1917). The facts of that case are instructive. In *Williams*, Pottawatomie Indians ceded their land around Lake Michigan to the United States and then moved west. Some fifty years later, they attempted to claim land which had originally been under Lake Michigan but had been reclaimed by the time of the suit. The Supreme Court held that the land under Lake Michigan, along with the rest of the aboriginal Pottawatomie land,

36. The Ninth Circuit also considered whether or not the railroad acquired a license for its right-of-way under various Congressional statutes granting rights-of-way to railroads. *See United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976).

had been abandoned. However, *Williams* is inapposite to the present case. The Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today.

VII. THE PASSAGE OF TIME HAS NOT BARRED THIS SUIT

[16, 17] The violation of the Nonintercourse Act which gave rise to this suit occurred in 1795. Plaintiffs did not commence this action until 1970, 175 years later. Defendants argue that the passage of time has barred this suit; they raise the defenses of statute of limitations,[37] laches, adverse possession and bona fide purchaser for value. Despite the extraordinary period of time which has passed, the action is not barred. The suit was commenced within the time permitted by 28 U.S.C. § 2415 which governs actions brought by the United States for or on behalf of Indian tribes. This period of limitations applies also to a case such as this one, brought by Indian

37. Defendants contend that the action is barred by two of New York's statutes of limitations: the six year statute of limitations governing actions "for which no limitation is specifically prescribed by law", *N.Y.C.P.L.R.* § 213(1) (McKinney 1972); and the one year and ninety day statute of limitations governing actions against a county, *N.Y.Gen.Munic.Law* § 50-i (McKinney 1965).

tribes in their own behalf. Even assuming the necessity of fashioning a federal statute of limitations, Congress has supplied the model to be followed by Section 2415.

[18] It is quite clear that state statutes of limitations and state laws of adverse possession and laches would not bar a suit brought by the United States on behalf of an Indian nation. Where the United States holds title to land in trust for Indians, adverse possession cannot run against the land. *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). Restrictions on the alienation of Indian land, which have their origin either in treaties or in land patents, are not weakened by the passage of time. Adverse possession and laches are no defense to a suit by the government to protect restricted land. "It has long been held that adverse possession under a state statute of limitations cannot run against Indians if the land is not alienable by them, so long as such restrictions exist." *United States v. Schwarz*, 460 F.2d 1365, 1371 (7th Cir. 1972); *see United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). In *Ahtanum*, the Ninth Circuit pointed out the impact of the Nonintercourse Act on these defenses.

> And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in *United States v. 7,405.3 Acres of Land*, 4 Cir., 97 F.2d 417, 422, arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

United States v. Ahtanum Irrigation District, *supra*, 236 F.2d at 334 (footnote omitted).

[19, 20] Similarly, where individual Indians sue to rescind transfers of restricted Indian land, state defenses cannot render the transfers effective. In a suit to declare invalid a transfer of a restricted land patent, the Supreme Court held that laches was inapplicable. *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922). Also, in an action for wrongful use and occupancy, a state statute which created a tenancy-at-will was held ineffective where Indian land had been leased in violation of Congressional restrictions. *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 280 (1923). If a transfer of Indian land is void under federal law, *see, e. g.*, 25 U.S.C. § 177, it cannot later be made valid by operation of state law.

[21] In the instant case, aboriginal Oneida land was transferred in violation of the Nonintercourse Act, 25 U.S.C. § 177. That statute declares, without any qualification, that no purchase made in violation of the Act "shall be of any validity in law or equity." The language of Congress could

not have been plainer. Although this purchase occurred in 1795, it had no validity then nor does it today. New York's statute of limitations and the doctrines of laches, adverse possession, and bona fide purchaser cannot validate this transaction.

This same conclusion has been reached by two other district courts in suits brought to regain Indian land alienated in violation of the Nonintercourse Act. *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn.1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I.1976). These cases emphasize the supremacy of federal law, which forbade the transfers, over state statutes which would validate them after the fact. The court in *Narragansett* went further. It noted that the United States, as sovereign, was not subject to these defenses. *See Narragansett, supra*, 418 F.Supp. at 805 and cases cited therein. It reasoned that the Congressional interests in protecting Indian land are the same, whether the United States or the Indians are plaintiffs. Thus, the Indians were permitted to assert the sovereign's interests and the defenses based on the passage of time were held inapplicable. It would be anomalous to permit the government, as trustee for the Indians, to achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf. *See Schaghticoke, supra*, 423 F.Supp. at 785.

This conclusion does not necessarily eliminate the application of any statute of limi-

tations. 28 U.S.C. § 2415 [38] provides a federal statute of limitations for cases brought by the United States for or on behalf of a

38. The relevant portions of 28 U.S.C. § 2415 provide:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.
>
> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for m.on-

recognized tribe of American Indians. Actions relating to restricted Indian lands are barred unless brought within 11 years of the date the claim accrued. Any claims

ey damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

. . . . . .

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

which accrued prior to July 18, 1966, the date of the statute's enactment, are deemed to have accrued on the date of enactment. Although Section 2415 does not expressly include suits brought by Indian tribes *in haec verba*, it has been so construed. *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir.), *cert. denied*, 423 U.S. 974, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975). Actually, whether the limitations of Section 2415 apply to suits brought by Indian tribes as well as the United States is irrelevant in this case. The plaintiffs' complaint was filed in 1970, well within the bar provided by the statute. *See Id.* at 472 (Miller, J., concurring).

VIII. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY

[22] Defendants argue that the case must be dismissed for failure to join the United States as an indispensable party. They contend that the fiduciary relationship between the United States and the Indian nation, along with the general federal interest in Indian lands, requires that the United States be made a party to the action or that the action be dismissed. Neither Rule 19 of the Federal Rules of Civil Procedure, nor the adjudicated cases require such a result.[39] The Court of Appeals for the

39. For an analysis of the factors to be considered in connection with Fed.R.Civ.P. 19, see *Prescription Plan Service Corp. v. Franco*, 552 F.2d 493 (2d Cir. 1977).

Tenth Circuit, faced with an almost identical situation, refused to dismiss the action. There, plaintiff Indian nations had sued to recover possession of land that was part of the tribes' communal allotment.

> If we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago. On the other hand, if they are permitted to prosecute the suit, in the absence of the United States, a judgment in favor of the defendants will not bind the United States. Defendants assert that that will result in a continuing cloud upon their titles. But, that is their present situation. So long as the United States fails to commence and prosecute to final judgment, an action to establish the title of the Nations to such lands and to recover possession thereof for the Nations, the title of the defendants will continue to be clouded by the possibility of the United States thereafter bringing such an action. So it comes down to this: If we hold that the United States is an indispensable party, the Nations will be unable to assert their long-standing claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.

> We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations.
>
> We conclude that a final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience.

Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456, 460 61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952).

Two recent decisions in cases almost identical to this one, have held that the United States is not an indispensable party. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass.1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I.1976). These decisions were based on a long line of cases which have consistently held that, whenever Indian tribes or individual Indians sued to recover either tribal land or individual allotments, the United States is not an indispensable party. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Jackson v. Sims*, 201 F.2d 259

(10th Cir. 1953); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), **cert. denied**, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952). *See generally* 3A *J. Moore, Federal Practice* ¶ 19.09[3] at 2325 (2d Ed. 1974).[49]

Defendants cite cases that have reached the opposite conclusion for the general proposition that, whenever title to Indian land is involved, the United States is an indispensable party. *See Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975); *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). However, those cases all involve attempts to burden land adversely to the interests of the Indians or the United States. Those cases have found the United States to be an indispensable party because the United States owns the ultimate fee title to such land, and because a judgment adverse to the Indians could impair the rights of the United States in that fee. Those cases differ from the instant suit by Indian tribes to recover aboriginal land, and this important distinction has been noted by the Tenth Circuit.

49. Nor need the United States be joined in an action against third persons by certain Indian nations to establish title to and to recover possession of land constituting part of the unallotted common domain of the nations, or in an action by an Indian tribe to quiet title to lands claimed under a treaty with the United States.

3A *J. Moore, Federal Practice*, ¶ 19.09[3] at 2325 (2d Ed. 1974) (footnotes omitted).

In *Choctaw and Chickasaw Nations v. Seitz*, [citation omitted] we recognized the distinction between the indispensability of the Secretary of Interior in a suit, the effect of which would alienate Indian land, and the dispensability of the Secretary in a suit, the effect of which would protect Indian land against alienation, particularly where the Secretary refused, refrained or neglected to protect the Indian's interest.

Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953).

Finally, defendants contend that *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975), compels a dismissal here. Defendants assert that *Passamaquoddy* requires a "*judicially*-initiated effort asking that the United States act on the plaintiffs' behalf" as "a prerequisite to any suit alleging noncompliance with the *Nonintercourse Act*." Defendant County of Madison's Post-Trial Memorandum 9. This suggested reading of *Passamaquoddy* lacks support in the facts. It appears to be a case of the wish being father to the thought.

Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address.

Passamaquoddy, *supra*, 528 F.2d at 375. Nor was the right of the tribe to litigate without the intervention of the United States at issue because of the apparent immunity of Maine to suit. *Passamaquoddy* definitely did not require a suit against the United States as a prerequisite to a tribe's suit under the Nonintercourse Act.

Two actions similar to the instant one, both brought in the First Circuit, have found that *Passamaquoddy* did not hold the United States to be an indispensable party. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass.1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I.1976).

IX. THE STATE OF NEW YORK IS NOT AN INDISPENSABLE PARTY

[23] Defendants contend that the action must be dismissed for failure to join the State of New York as an indispensable party. Defendants argue that, as counties, they hold land only as agents of the State. They further argue that an action against the counties will be binding on the State under the law of agent and principal—thus making the State an indispensable party and requiring the dismissal of the suit. The first premise of this argument, however, is faulty and with that faulty foundation removed, the argument collapses.

[24] New York County Law empowers a county's Board of Supervisors to "acquire

by purchase or condemnation and accept by gift real . . . property for lawful county purposes." *N. Y. County Law* § 215(3). The county is permitted to lease such property (*Id.*), build upon it (*Id.*), and "sell and convey all the right, title and interest of the county therein." *Id.* § 215(5). Nothing in the statutes limits the extent of the county's title nor specifies that the county holds property as an agent for the State. Neither do any of the cases cited by defendants state that counties in New York hold title to land as agents of the State. *Village of Kenmore v. Erie County*, 252 N.Y. 437, 169 N.E. 637 (1930) (statute requiring counties to collect taxes for villages struck down as violative of state constitutional provision forbidding counties from incurring debts); *Village of Croton-on-Hudson v. County of Westchester*, 38 A.D.2d 979, 331 N.Y.S.2d 883 (2d Dep't.), *aff'd*, 30 N.Y.2d 959, 335 N.Y.S.2d 825, 287 N.E.2d 617 (1972) (county enjoined from diverting parkland to use as a dump without legislative authorization). One case cited by defendants stated, by way of dicta, that a "county is a mere agent of the State." *County of Cayuga v. McHugh*, 4 N.Y.2d 609, 614, 176 N.Y.S.2d 643, 647, 152 N.E.2d 73, 76 (1958). However, the New York Court of Appeals added that counties, as political subdivisions, have "no power save that deputed to them by [the State Legislature]." *Id.* The language of § 215 of the County Law is clear enough—the State has authorized counties to acquire lands, to hold title to these lands, and to use

or dispose of them, within certain limits. *N. Y. County Law* § 215. *See also Cooke v. Mulligan*, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup.Ct.1975).[41]

Ward v. Louisiana Wild Life and Fisheries Commission, 224 F.Supp. 252 (E.D.La. 1963), *aff'd*, 347 F.2d 254 (5th Cir. 1965), cited by defendants, is inapposite. There, the state was the record owner of the land in question. That land had originally been deeded to the Louisiana Board of Commissioners for the Protection of Birds, Game and Fish. A subsequent statute transferred the land to the State of Louisiana.

Since the defendants are the record owners of the land involved in this suit, and since they hold this land in their own right and not as agents for the State, the State need not be joined. Fed.R.Civ.P. 19(a). Complete relief can be accorded among the present parties; the State cannot be prejudiced in any way by its absence; nor does

41. All of the properties involved here had already been acquired by Albany County as the result of previously held tax sales—most, if not all, of which were conducted long before the plaintiff was elected to office. As such they must be considered county properties and the County owns them proprietorially and can continue to hold them, sell them or lease them pursuant to the provisions of County Law § 215, or otherwise dispose of them at such times and upon such terms as shall be determined by the County Legislature, with or without advertising for bids, subject only to ultimate approval by a majority vote of that body.

Cooke v. Mulligan, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206. (Sup.Ct.1975).

the State's absence subject any of the parties to possible multiple liabilities. Dismissal under Fed.R.Civ.P. 19(b) is not required. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass.1977).

Defendants concede that the Eleventh Amendment does not insulate them from suit. They argue that the suit must be dismissed against them, however, because the State cannot be made a party defendant by reason of the Eleventh Amendment. Having already determined that it is not necessary to make the State a party defendant, it is equally unnecessary to consider any argument based on the Eleventh Amendment.[42]

X. FORM OF THE ACTION

Casting about among the old common law forms of action for a label with which to tag the claim in this action, the defendants state, "it is difficult to characterize the nature of the plaintiffs' action." Defendant County of Madison's Post-Trial Memorandum 26. They find the most appropriate to be either the old common law "action for use and occupancy" or "an action for wrongful desseisin" or one "of trespass for mesne profits." The defendants then argue with some force that the complaint does not allege all of the essential elements required for any of those actions. *See Crawford v.*

42. In any event, equity and good conscience, as in the case of the United States, would militate against dismissal. Fed.R.Civ.P. 19(b). The State is no more an indispensable party than any other person in the chain of title.

Town of Hamburg, 19 A.D.2d 100, 101, 241 N.Y.S.2d 357, 359 (4th Dep't. 1963); *Kolman v. Wilen*, 283 App.Div. 1113, 131 N.Y.S.2d 679, 680 (2d Dep't. 1954); *see generally* 28 C.J.S. *Ejectment* § 132 (1941); 91 C.J.S. *Use and Occupation* § 3 (1955). There is no need to consider the pleading question posed by this argument. As I said in the initial decision considering the jurisdictional question, "[n]o purpose would be served trying to tack a name on the cause of action asserted." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 3 (N.D. N.Y., November 9, 1971).

[25] To start with, the precise form of this action, which would have been so important at common law, is no longer determinative of the action's outcome. Under the Federal Rules of Civil Procedure, the question is not how plaintiffs have characterised the action, but whether plaintiffs are entitled to relief. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Fed.R.Civ.P. 54(c). *See generally* 6 *J. Moore, Federal Practice* ¶ 54.62 (2d Ed. 1976); *10 C. Wright and A. Miller, Federal Practice and Procedure* § 2664 (1973).

> [It] is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, trover, money had and received, or trespass. The real question is whether, under the facts disclosed

> in the complaint, the plaintiff is entitled to relief. If he is, the court can apply the proper remedy, [under] Rule 54(c) . . ..

Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp., 28 F.Supp. 586, 588 (W.D.Pa.1939). *See also Herzog & Straus v. GRT Corp.*, 553 F.2d 789, 791 n.2 (2d Cir. 1977).

[26] Neither can the defendants derive comfort from their contention that the plaintiffs' complaint and proof failed to meet the requirement of state law. "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law . . .." *Oneida Indian Nation, supra*, 414 U.S. at 674, 94 S.Ct. at 781. Referring to the Indian tribes' right of occupancy, the Supreme Court pointed out that such right "sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. . . . [T]hese tribal rights to Indian lands became the exclusive province of the federal law." *Id.* at 667, 94 S.Ct. at 777. Thus, it is of little import that the plaintiffs failed to establish the elements of a state-based cause of action. *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62

S.Ct. 1293, 86 L.Ed. 1764 (1942) (Seneca Indian Nation suit not barred by failure to comply with state law).[43]

43. In *United States v. Forness*, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), the Seneca Indian Nation sued to cancel a 99 year lease of a portion of its land. Defendant lessees first argued that the suit should be dismissed since they had tendered the rent as New York law requires. The Second Circuit refused to apply New York Law. *Id.* at 933. Defendants also argued that, according to the common law, the remedy of cancellation was unavailable because plaintiffs had not made a demand for the rent. The court rejected this argument and declined to be bound by "ancient doctrine." *Id.* at 937

> It follows that we are here at liberty to apply legal rules as to landlord and tenant which comport with the Congressional intent concerning the Senecas.

Id. at 938. The Court of Appeals ultimately remanded the case to the district court for entry of judgment in favor of plaintiffs, on the condition that plaintiffs' offer for a new lease at a more reasonable rent be kept open. *Id.* at 943.

APPENDIX B—Decision of the District Court, Dated October 5, 1981.

(57) IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK, *et al.*,

Plaintiffs,

v.

COUNTY OF ONEIDA, *et al.*,

Defendants.

70-CV-35

Decision in the above-captioned matter by Honorable Edmund Port, in the United States Courthouse, Auburn, New York, on October 5th, 1981.

Appearances:

For the Plaintiffs: Arlinda Locklear, Esq., Bertram Hirsch, Esq., Francis Skenandore, Esq., Lawrence Aschenerenner, Esq.

For the Defendants: Allan Van Gestel, Esq., Tobin N. Harvey, Esq.

(58) The Court: Miss Locklear, gentlemen, as I indicated at the close of the evidence, I intended, if it was possible, to hear your arguments and to render my Decision on the record following that. I see no reason why that should not be followed.

I have had an opportunity, of course, since the trial to examine the exhibits, to review my notes, where I felt it was necessary, and to review the memoranda that were submitted. I want to thank Counsel for the thoroughness with which this case was prepared and presented to the Court. It was very helpful to me. In fact, speaking of thoroughness, the thoroughness reached the point of reminding me of the tactic which, without meaning to be disrespectful to any Court, I can't say that I wasn't guilty of using when I was practicing law, and, that is, throw anything at the old fool. You don't know what he will pick up if he wants to hold your way.

Some of the arguments, at least to my simple mind, were pretty far out; but I understand the importance of the case and I understand the necessity of making a record that includes (59) every possible or potential argument that can be advocated in favor of either of the parties.

What I am about to place on the record will constitute the findings of fact and conclusions of law, and, of course, what's put on the record now is supplemented by my previous Decisions, all along the line, and by some prepared, written findings of fact and conclusions which I will file with the Court. Those findings and conclusions were largely, if not wholly, derived from the suggested findings of fact and conclusions submitted by Counsel. When I say they were "derived", rather, I culled with various modifications from those suggested findings and conclusions.

Now, throughout my discussion I'll probably refer to the Oneida case. If I do, it encompasses the Supreme

Court Decision in the case, various Court of Appeals Decisions, and my previous Decisions as they are applicable to the particular circumstances embodied in reference. I think that I ought to probably make a caveat in view of some of the arguments that have been (60) made that I will use the words "ceded" and "conveyance" and words of similar import with reference to the effect and purpose of the 1795 Treaty and by doing so I in no way intend to leave an inference that I'm, by the use of that language, legitimatizing or validating the purported transfers that were made by that instrument and which I held to be invalid and of no effect.

For our purpose at the present time, I think we can treat the trial as having been bifurcated. The first part decided in 1977 by me determined the issue of liability in favor of the plaintiffs and against the defendants. I may state in relation to that, that I thought I made it pretty clear that the plaintiffs had standing and were the proper parties to institute the action. I'm repeating it because the argument was again raised. The trial that occupied a few days recently related to the specific amount of damages, if any, to which the plaintiffs are entitled. Ordinarily the determination of the amount of damages awarded is regarded as the (61) most important part of a case. Counsel generally look to the last line of the Decision to see how many dollars are involved. In this particular instance, I don't think that's the case. I feel in this case, and I have expressed the feeling before, that the determination that was made in 1977 by me, that the defendants were liable to the plaintiffs, was of much greater importance in the context of the entire problem than the number of dollars that happened to be awarded.

A brief review of the efforts to obtain a definitive Appellate Court ruling before the damage trial might be well at this time.

In 1977, in my Decision holding the defendants liable to the plaintiffs, because the plaintiffs, I found, were occupying the particular subject land in violation of the Non-Intercourse Act, I made certification required under 28 USC Section 1292(b), that would permit an appeal from that Decision. Reference is made to the Oneida case at 434 F.Supp. 527 at Page 548. The appeal from that particular determination was (62) aborted when the parties stipulated to withdraw the appeal. Considerable time elapsed during which hopefully, I think, I—I can't speak for anyone else—thought that it might be possible that some disposition, other than a court disposition, could be made of the issues involved here.

However, that was a hope that remained unfulfilled.

Recently, there was a motion made for a summary judgment based on the determination of the Oneidas' claim before the Indian Claims Commission and in the Court of Claims. In ruling on that motion, which I denied, I again granted the certification to appeal from that Interlocutory Judgment. An application was promptly made to the Court of Appeals for the necessary certification for leave to appeal and it was granted. Unfortunately, from my viewpoint, after the appeal was perfected and argued in the Court of Appeals of this Circuit, that Court dismissed the appeal as improvidently granted so that another opportunity to get a definitive (63) Appellate Court Decision on what I considered to be the important phase of the case, that is, the liability, was missed. I apparently don't give up as readily as I should and still, having that same viewpoint paramount in my mind, urged the parties to attempt to stipulate for the purposes of this trial, only, the amount of damages so that an appeal could go forward promptly.

That suggestion proved impractical. After that, the parties engaged in lengthy preparation for this trial phase, or

this damage phase of the trial. That preparation included extensive and extended discovery, including the Freedom of Information Act suit, and an appeal, *County of Madison vs. The United States Department of Justice*, 641 F.2d 1036, First Circuit 1981. So that ultimately we have reached this trial of the damage issue which was, which occupied much more time than I think it should have, and I think I'm responsible for that by reason of the liberality with which I received evidence and ruled on the reception of that evidence. But this (64) case was of sufficient importance so that an appeal should, in my mind, be on the most complete kind of a record.

Some place earlier in this proceeding, I commended the plaintiffs for the manner in which they sought to have this problem resolved. I repeat that commendation. The plaintiffs here have sought to have their rights to the land ceded in the 1795 Treaty determined in the least disruptive fashion to the present owners and occupants of it. They brought this present action in 1970 and some time later, I think, or maybe earlier, designated it as a test case, and rather than seeking ejectment or damages for the almost two centuries of alleged illegal occupancy, they sorted the defendants out, selected the two counties, and sued only for the damages for the use and occupancy of the county lands during 1968-69. This is in sharp contrast to the methods employed in other similar situations, for instance, I had the Mohawk case.

In that case, they applied self-help. The Mohawks merely went up in the Adirondacks, took (65) over a piece of land that they claimed was within their aboriginal land, and seized it and held it by force. That situation is described in *New York vs. White*, 528 F.2d 336, Second Circuit 1975. At the same time, New York State instituted an action in this court, various property owners instituted actions in State Courts which resulted in a compromise being reached

between the Mohawks and the State of New York, I think, by which some land up in northern New York was transferred to the Mohawks along with various other stipulations, but it was resolved and not in a court; although I'm sure that the State Court's determination and this Court's determination had something to do with the compromise that was ultimately reached.

The plaintiff's make claim in their memorandum in support of the proposed Order and the measure of damages at Page 2 the limited nature of the relief being sought. On Page 2 of that memorandum they state, "The Oneidas do not seek to expand the relief sought beyond the original test case". In their Complaint, the Oneidas sought damages for the counties' illegal (66) use and occupancy of Oneida land during 1968 and 1969.

At the damages trial, the Oneidas intend to offer proof of their proposed measure of damages for the years 1968 and 1969 only. Neither do the Oneidas intend to pursue their right to evict the counties in this action."

So that our issue here was well defined and limited. The specific plots of land occupied by the defendants were not particularized in the trial of the liability issues. The parties, however, stipulated that the parcels occupied by the defendants prior to and in 1968 and 1969 and of which they were and are the record owners and possessors, are part of the land transferred in 1795, that was at Page 6 of the transcript of the liability trial.

Anyone with any experience with litigation knows that it is not unusual for litigants to take extreme positions in furtherance of their respective causes. The parties have done so in this case in relation to the damages. The plaintiffs claim the highest possible amount as (67) damages while the defendants assert damages are non-existent. To me a fair disposition supported by law lies between these extreme positions.

A statement of the law to be applied is not difficult. The parties are in accord that under the Supreme Court Decision in this case the applicable law is the Federal Common Law, "the governing rule of decision would be fashioned by the Federal Court in the mode of the common law." That's from the Oneida case at 414 U.S. at 674. From that point on there's "divergence" of course in the views of the parties. They differed greatly as to how the common law should be fashioned but they agree, again, that the principal objectives in fashioning the applicable law should be "the vindication of Federal preeminence in Indian affairs", Defendants' Reply Memorandum, Page 16.

The parties see the means of vindicating Federal preeminence in quite different ways. The defendants arguing that this case be achieved only "by granting these claimants no relief whatsoever". There is no mistaking the position there. The quote ended with "whatsoever". (68) Defendants' Reply Memorandum on Page 18.

The plaintiffs say vindication requires awarding the highest possible damages as rent computed on the basis of the occupied land with the improvements as they existed in 1968 and 1969. As a fall-back position, the defendants argue that if damages are to be awarded, that the Federal Common Law should be fashioned by the virtual wholesale adoption of New York State law, case law and statutory law both.

In applying that law, the defendants say that any damages sustained by the plaintiffs should be "reduced by the aggregate of the following: (a) The value of all consideration received by the Oneida Nation at the time of the transfer of the subject property in 1795. (b) The value of all subsequent payments received by the Oneida Nation or any of the plaintiffs pursuant to the 1795 transaction, including any annuities received and any capitalized annuity payments made. (c) The value of the use by the plaintiffs

then selves including any members of the plaintiff tribal entities of the County lands, roads, and (69) facilities within the claim area during the two-year period at issue." Defendants proposed findings of fact and conclusions of law, page 14.

As was indicated on the oral argument, although I don't think anybody made any computations, that reduction by the aggregate of the items claimed by the defendants would result in a verdict of no damages. As I have indicated the plaintiffs want a Judgment reflecting the fair market value, the fair rental value, rather, of the lands as of the improved 1968-1969 condition; that is, with the highways built and so forth. And, in addition, damages for "waste or other injuries to the land" with interest at the prevailing rate on prudent investments. Plaintiffs' joint proposed findings of fact and conclusions of law, page 10.

That there was a federal and is a Federal Common Law applicable, I think, is pretty clear. Long before the adoption of our Constitution, the English Common Law recognized an action for damages which is incorporated into our common law, resulting from the unlawful (70) occupation of plaintiffs property. As a matter of fact, I remember, it's over fifty years now so that my recollection is somewhat vague and hazy, but I do remember that in law school in some course, either Real Property or Common Law, I remember the professor talking to us about a "Trespass Quare Clausum Freight"; that may be what we have here. I am not sure if you have to give it a name, but the principle, however, has been applied in the Federal Courts for ages.

The unlawful use and occupation of land entitles the plaintiffs not only to recover the land but to damages "measured by the reasonable value of the use and occupancy considering its extent and duration", *Utah Power*

and Light Company vs. United States, 243 U.S. 389-411, 1917. And in dealing with this entire subject, I think it is well to keep in mind what was said in *United States vs. Gilbertson, et al.*, 111 F.2d 978-980 (7th Cir., 1940), that "in general statutes passed for the benefit of dependent tribes or communities are to be liberally construed, doubtful expressions being resolved (71) in favor of the Indians," citations omitted.

Both parties, as I have indicated, agree that vindication, preservation of the preeminence of the United States in Indian affairs should be the guiding principle behind the fashioning of a common law remedy. Plaintiffs, of course, have said that in order to fashion appropriate law that their damages should fully compensate them and deprive the defendants of any profits or benefits by reason of their unlawful use of the land.

The defendants say that the only way that this principle of Federal preeminence in Indian affairs can be vindicated, can be achieved, "only by holding that the Oneidas are entitled to no relief whatsoever", Reply Memorandum of defendants on the issue of remedies, pages 16-18.

As I indicated earlier, I find it impossible to accept either of these views.

The defendants also claim that traditionally damages have not been awarded for violations of the Non-Intercourse Act and that (72) violators are not called upon to respond in damages. They also say that by granting them the offsets that they seek would not at all be inconsistent with applicable law or with the vindication of Federal preeminence. They also meet the argument of the plaintiffs that the Counties are bad-faith occupiers by saying that, of course, if New York State was in bad faith, that is one thing; but the sins of the State do not fall on the Counties of the State under these facts.

Their argument, the defendants' argument that damages, again to the claim of lack of implied cause of action. They distinguish the cases that they have awarded damages by pointing out that in those cases there were violations of statutes relating to allotments rather than violations of the Non-Intercourse Act. To support that argument, they point out that the allotment cases derive viability from the General Indian Allotment Act of 1887, 25 USC, Section 345. That section is inapposite. All that does is afford District Court jurisdiction (73) over allotment claims. There is no question about the jurisdiction that this Court has. I learned that lesson from the Supreme Court in this case so that nobody can argue jurisdiction here. This Court has jurisdiction and in determining that this Court had jurisdiction, the Supreme Court, of necessity found that the Complaint alleged a claim entitling the plaintiffs to relief. That, if not explicit, was certainly implied in the Supreme Court Decision in this case.

The defendants read the Supreme Court Decision as limited to a finding of jurisdiction. But merely assuming, without deciding that a valid claim had been asserted and they quote from *Burks vs. Lasker*, 441 U.S. 471, at page 476, Note 5 that the "question whether a cause of action exists is not a question of jurisdiction and, therefore, may be assumed without being decided". The assumption, however, is made on the basis of pleadings alone. There aren't any facts. We have had a trial here. Right or wrong, I've decided that the defendants were liable.

The defendants also argue that many of (74) the cases upon which the plaintiffs rely "do not even award the plaintiff damages or alternatively do so without the benefit of any discussion as to whether there is an appropriate remedy"; Defendants' Reply Memorandum on the issue of damages, page 33.

To my mind it is too late in the day to credit this argument. There are many cases cited in the parties' Briefs and

the earlier Opinions in this case that have, in fact, awarded damages. And some of the cases, the more extreme remedy of removal of the illegal occupant has been ordered and in all of the cases the occupant was in a chain of title derived from a conveyance by Indians executed in violation of the statutory restriction on alienation. As a result of which, as it was found in this case, the conveyance was void. For example, *Heckman vs. West*, 224 U.S. 413, 1912, *United States vs. Boylan*, 265 F.2d 165 and I am sure that you could go on with citations in a string, if you were so inclined.

The defendants in support of their claim that Federal primacy in Indian affairs can (75) only be vindicated by denial of damages to the plaintiffs present a convoluted thesis. The principal thrust of the argument is a reassertion of the non-justiciability and the lack of implied cause-of-action arguments. These were made earlier. I have ruled adversely to the defendants. Those arguments did not, in my opinion, support a dismissal for failure to state a claim after a trial. They do not support a denial of damages. I think what's been missed here, when you talk about implied causes of action under the Non-Intercourse Act, is that it is not necessary to seek out an implied cause of action. This old common-law action of trespass will do very well. Why be inventive? You're going to invent the wheel all over again. Then defendants go on placing under the rubric of the vindication of Federal preeminence in Indian affairs and presented argument that the Treaties of 1798 and 1802 were offered and received in evidence in the liability trial. There is no argument about that.

But they maintained that those Treaties (76) constitute a ratification of the 1795 conveyance. If I am not mistaken, and I don't think I am, that same argument was presented on more than one occasion earlier as a plain ratification argument. It's now been placed under the requirements

for vindication—it's now been placed under the vindication argument but it is the same argument dressed up in a new costume. The costume makes it no more effective nor neither does the repetition. That suggests to me—perhaps I should digress for a minute to just explain that this is a District Court, this is the bottom rung of the hierarchy of the Federal Judicial System. The District Court has not and none other than the Supreme Court has the luxury of refashioning what appears to be existing law by reason of contemporary times or conditions. That luxury resides solely in the Supreme Court of the United States. And in saying that, I recognize that it's necessary to make the arguments here to avail one's self of them in the higher courts. So that while if I appear a little edgy about repetition, it's (77) with a recognition of the necessity for making the arguments here but this argument about the 1798 and 18—1794, 1798, 1802 Treaties are really nothing more than what country lawyers would refer to as incorporation by reference in a Deed. It boils down to the claim that reference in a Deed to a metes and bounds description of the boundary line used in a previous conveyance constitutes a ratification of the validity of the earlier conveyance. It just doesn't add up. All the elements necessary for ratification, I find, are missing.

Further, the matter of ratification is the defense that should have been in, and in fact, was raised in the liability trial. In my Decision in that phase of the case, after finding that the 1795 Treaty was not consented to by the United States, I said, "No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The Federal consent required by the Non-Intercourse Act was not obtained before or after the fact", 434 F.Supp. at 538.

(78) Nothing has been changed and nothing has been brought to my attention up to this point to change that statement.

The plaintiffs' view of the damages to which they are entitled requires that rent be computed for the subject land with the improvements existing on it from 1968 and 1969, and with all of the profits that would be derived from those improvements; if there were a skyscraper on it, the rent being paid by the tenants, the actual tenants of the space would be part of the damages to which the plaintiffs would be entitled.

The defendants, as I indicated earlier in summing up their arguments, say that any damages that are given to the plaintiffs must be must have from that sum deducted these other monies they have received and so forth and including the use by the plaintiffs and their members of the roads and other public facilities. In other words, most of us could use these county roads in Madison and Cayuga County without paying anything. As far as the Indians are concerned, they become a toll road; that is about the effect (79) of it.

I think somebody smiled when they threw that one at me. Of course, that position is neither supported by the law or the facts and just on the face of it, it would seem terribly inequitable to deduct the amount that the plaintiffs received for land illegally used by interlopers for almost two hundred years against an award covering approximately one percent of that time. I indicated that I could not adopt either claim as to damages. This is a case, probably, that the Court will have to rely on Gilbert and Sullivan for precedence and "let the punishment fit the crime."

I recognize that plaintiff's argument to vindicate and to give the tribe damages as to means of vindicating the federal supremacy is not treated, at least by them, as a penalty. But it seems to me that the policy of the Non-Intercourse Act in the light of the facts and the claim made here can be done with far less draconian methods.

The plaintiffs argue at some length (80) and with some sincerity, I am sure, that the entitlement to these large damages that they have claimed arise out of the bad faith of the defendants. I recognize that good faith is not a defense to a common-law action for damages for unlawful use and occupancy of land. However, even under the oldest cases a good-faith occupier was permitted to offset the value of the improvements against the damages, *Green vs. Biddle*, 21 U.S. 1, 1823. Plaintiffs say that the State of New York not being an occupant in good faith, and the defendants don't feel it is necessary to defend the State of New York at least on this argument, just say that, that unlike the plaintiffs who claim that the defendant counties, the successors in the chain of title to the State of New York, stand in their shoes.

The defendants say that isn't so. There is no bad faith, and that they don't succeed to the bad faith in the State of New York.

I am inclined to agree with the defendants insofar as the right to occupancy is (81) concerned and no matter what, I don't think it's necessary to treat the counties as bad-faith occupiers for the purpose of assessing and fixing damages. The bad faith consisted of the violation of the Non-Intercourse Act by the State of New York. Counsel have referred to the knowledge on the part of the State of New York of the requirements of the Non-Intercourse Act and the liability trial had much historical data to support that law.

However, there is no evidence to connect the defendants, these two counties, with that act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 and, of course, we are not concerned in this case with any other time. As a matter of fact, there is no evidence as to when or how the counties acquired this land. The Wooden Ware case that

was referred to by the Counsel as supporting their view, I think is distinguishable on the facts, as I think I pointed out during the argument. In that case, the good-faith purchaser (82) was merely being held in damages for the increment that he received at the hands of the trespasser or the culprit. He wasn't, and the Court didn't fix, liability on him for improvements that he put in, if any, that he put into the wood that he acquired, the timber that he acquired from the trespasser. And while the Supreme Court Decision doesn't show what happened with that particular timber, I don't think you have to have much of an imagination to think that by the time the case reached the courts that it was in some condition other than the posts or logs or whatever that he bought from the Indian trespasser.

The *Russian American Packing Co. vs. United States* case, 199 U.S. 570, relied on by the plaintiffs is also inapplicable. In that case the plaintiff seeking recovery with the value of improvements it made on the land was not an occupier in good faith. It "was a mere trespasser in occupying the land without a shadow of title", 199 U.S. 579. I think the courts have established that in Indian allottee, (83) of tribe seeking to cancel or to declare a conveyance made in violation of the Non-Intercourse Act void, is not required to return the consideration received as a prerequisite to maintaining the action. But as clear as that rule appears to be, even that apparently is not absolute. Even in such a case the Court has not ruled out the possibility that under some circumstances a return of the consideration might be required, *Heckman*, 224 U.S. 447.

And in other cases the Courts have indicated that they are not adverse to ameliorating the harshness of the offset rule under appropriate circumstances if the principle, of Federal supremacy is not disturbed and is equitable. In *United States v. Brewer*, 184 F. Supp. 377, District of New

Mexico, 1960, although the Court entered an Order of Eviction against the unlawful occupants of Indian land who had erected improvements on it, I think to the extent of some $9,000 which was apparently regarded as substantial in the case, the Court stayed the eviction for six months and also permitted (84) defendants to take as much of the improvements and building materials as they were able to. In *United States vs. Forness*, 125 F.2d 928, a case arising in this Circuit in 1942 to which reference was made in my liability Decision, the Court there granted a cancellation of a lease with the Seneca Nation of Indians.

In some facets, this case is reminiscent of that one. That case involved a four-dollar lease but there were hundreds of others. This case involves a relatively small piece of land within a much larger area. In any event, the Court, while entertaining a Decree cancelling the lease because it violated an alienation disqualification, required that the Senecas keep open an offer to lease under different terms for a period of sixty days.

Now, that offer to lease had been earlier made by the Senecas in my mind denying the request to fix the rental on the basis of the existing proof, that is, highways run into millions of dollars and denying that request is equitable and does not do violence to the principle (85) of Federal supremacy.

In getting down to evaluating the dollar worth of the unlawful use and occupancy of this land for two years, a difficult problem is presented. Of course, it is unique in that it is Indian land and it is unique also in the very differing degrees in which the parties see the damages. The usual case fixing rental isn't a terribly tough chore; experts come in; the building across the street was rented for a certain amount, the building next door was rented for a certain amount during the period; and you get pretty good guidance. But here we are dealing with a much more difficult factual situation but that doesn't mean it can't be

done, that it isn't a question that can't be handled. Courts every day put dollar signs on, I think, much greater imponderables. They put a dollar sign on the pain that a plaintiff suffers, pain that nobody else in the world can feel.The Courts that are able to do that, I think, can fix damages with some degree of reasonableness and equity in a case such as this.

(86) I mention that in passing because the argument has been made that this was a matter not only inappropriate for Courts to handle but which Courts were unable to handle. Searching around for a basis upon which to fix damages. This is not an eminent domain case, obviously. Eminent domain, the State or government would be taking the land lawfully and they would be required only to pay due compensation, assuming, of course, the other elements of the taking are met.

Here the taking was unlawful but it still boils down to this: That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent domain could be applied here and do justice to the parties. This is by reason of the delicacy or consideration with which the plaintiffs brought on this action with only—(87) we are only dealing with what amounts to a two-year occupancy or an easement for two years so that that is the view that I would be obliged to take. I can't say that I wasn't confused by some of the evidence concerning the damages and the value. A good deal of it took on the aspects of how many angels can dance on the point of a pin, as far as I am concerned. In fact, one of the witnesses I think aptly described some of the assumptions as "fantasy".

I would endorse that viewpoint. In fact, under the defendants' testimony it was like listening to the story of

Rip Van Winkle. Somebody went to sleep in 1795 and woke up in 1968. Maybe I will be Rip Van Winkle when the Supreme Court gets through with this case, I don't know.

In any event, the evidence that I received from the defendants as to the value I gave no weight, practically no weight at all. The approach that I think was fairly presented and from which damages can be determined was the approach used by plaintiffs' experts in what (88) they described as "across the fence value". That is, they looked at the land, not as the defendants' witnesses did, as it existed in 1795, but the plaintiffs looked at it as it existed in 1968-1969. What you find then are a park, gravel pit, a radio tower, roads running through a county. But now would you evaluate these smaller parcels there seems to be little or no dispute about except when we get down to the defendants' blanket evaluation of three or four dollars a year per acre? That was it, and the defendants, of course,—then I am not sure at one time the defendants' expert viewed the entire countryside as it existed in 1795.

In another part of his testimony, I got the impression that he viewed the county lands, envisioned them in 1795 and the surrounding areas in 1968-69. There were two time periods. We got a dense, some kind of a forest or wilderness running where these roads are, farms, cities, urban communities, what-not on either side. That I think the witness himself (89) called "fantasy".

The approach that was appealing was the approach of the plaintiffs that determined the value of this road and the other properties on the basis of the conditions as they existed; that is, part of this highway, I'm sure, was much more valuable, or I should say, more valuable than other parts and he divided the areas up and allotted to each particular area an evaluation.

He found that the Madison County-Champlain Park consisted of forty-seven acres at $225 an acre and the total

value, market value of $10,060. The only evidence—I don't think there was any evidence; if there was, it came under the catch-all of $30.00 an acre for the defendants' view which I didn't adopt. The rental was fixed at five percent of the value or $530. That figure I accept.

The radio tower, a small item of virtually two acres, was computed to have a fair market value of $1,750 by the plaintiffs' expert and $60.00 by the defendants'. I think that the plaintiffs' expert demonstrated a much sounder (90) base and impressed me as not exaggerating the value of the property and I accept his valuation. He computed the rent at ten percent of that or $175 and that is accepted.

The Madison County roads he found needed three different classifications. He found that there was about 322 acres which would be classified as the highest and best use for agricultural or recreational land and he valued that at $125 an acre. He found fifty-four acres having the highest and best use of residential and three acres having the highest and best use for commercial purposes. These were evaluated at $750 an acre for residential and $1,400 an acre for commercial land, making the total fair market value of $85,000.

The defendants applied, as they did to everything, thirty to forty dollars an acre which I gave no weight. I considered it but I don't think it was deserving of weight based on the supporting basis upon which the valuations were made. All of the experts did agree, however, that in fixing the value of a rental or easement (91) in this area that the uniformly-acceptable standard was to fix it by taking the market value, fair market value, multiplying it by ninety percent and then multiplying by five percent, and that is, five percent of ninety percent of the value, fair market value. Computed on that basis, the $85,000 fair market value for the rental or value of the easement for the two years would be $3,825.

The smaller parcels, the Champlain Park and radio tower, were found to have the highest and best use in accordance with their present use. Under these computations, the plaintiff during the two years has been damaged by the unlawful occupancy by Madison County to the extent of $9,060. With reference to Oneida County, the defendants' expert made no appraisal at all, if I recall. If there was an appraisal, it would come under his catch-all thirty-five dollars-an-acre which I cannot accept for the same reasons that I could not accept the defendants' expert with reference to Madison County lands.

The plaintiff found that there was a gravel pit of thirteen-some acres which had a fair (92) market value of $7,200. This is undisputed and accepted. He fixed the fair market value at $550 per year, which is also accepted. I think, which also is undisputed, the defendants' expert said he made no appraisal of the gravel pit.

With reference to the roads, an examination of the area through which the roads run places approximately 400 acres in the agricultural and recreational land highest and best use, 30 acres within a residential highest and best use. The agricultural-recreational land at $125 an acre, the residential land at $750 an acre; making a total valuation of the unimproved land for the Oneida County roads of $72,600. Applying the formula which all of the experts agreed upon would result in $3,267 per year. The total fair market rental value or damages sustained by reason of the Oneida County's unlawful occupancy of the land comes to $3,817, that's treating the highest and best use for the roads, as I have indicated, and the highest and best use for the gravel pit as a gravel pit, a partially-worked gravel pit. (93) With reference to damages relating to waste from the gravel pit, I recall no testimony. I don't know that anything was taken from the gravel pit during the years in question so that the total damages sustained by the plaintiffs at the hands of Oneida County for two years is $7,534.

We now come to the question of interest. I had no problem with finding that the plaintiffs are entitled to interest. They were deprived of the use of their land during these two years. That deprivation has a dollar figure. And the interest should be part of their damages. The manner of computing the interest raises a problem. The Intercourse Act, the cases to which I have been referred as far as I was able to see, offer no instruction as to how to compute the interest. In this particular case, barring some absolute requirement, I feel it would not be inappropriate to look to the law of the State of New York for guidance. I have done that and I have incorporated New York law as I feel it is applicable and equitable to the verdict (94) here. The defendants are counties. We all know the rules that the Legislature has provided, rules for the fixing of interest in the case of Judgments and claims against counties, against municipalities, under New York General Municipal Law, Section 3(A)2. Interest against municipalities is limited to three percent, except in the cases of condemnation and wrongful death; in which cases it is six percent.

Technically, this is not, as all Counsel seem to agree, well, obviously not a wrongful death and Counsel seem to agree that technically it is not a condemnation suit; however, the rule of damages in condemnation suits has been referred to, and I think appropriately and I think that the rate of interest to be applied in condemnation suits provides the best guide under the facts of this particular case. The damages here parallel the measure of damages for acquiring temporary easement for road purposes or other purposes. Possession by the municipalities was acquired without the consent of the rightful owner and adapting New York Law of Interest as it relates (95) to claims and Judgments against counties, I think it is appropriate to fix interest at six percent per annum.

There is probably some housekeeping that we should do. There were motions made, or at least one that I can

recall, to strike one of the expert's testimony on the value of the appraisal. The motion is denied. As I indicated earlier, this dictation on the record, coupled with some partial findings which I will file with the Clerk, copies of which will be available to Counsel right after the trial, right after my dictation here, together with all of the other Opinions and proceedings in the case constitute the findings of fact and conclusions of law.

I will dictate a very short Order this afternoon directing the Clerk to enter Judgment in favor of the plaintiffs and against the defendant County of Madison in the sum of $9,060 with interest at six percent per annum from January 1, 1968, and a Judgment against the defendant County of Oneida in favor of the plaintiffs in the sum of $7,634 with interest at (96) six percent per annum from January 1, 1968.

Judgment in those sums will be entered forthwith.

Now, can anybody help me, the third party, I haven't thought of looking it up earlier, but the third-party action here has not been disposed of, obviously. Is it necessary for me to make certification of some kind where Judgment is entered against fewer than all of the parties?

Mr. Van Gestel: If your Honor please, Rule 54(b) addresses the situation and it suggests when there are multiple parties or when there are cross claims or third-party claims in the absence of such a determination by the Court there will be no final Judgment, that is then appealable, so you would have to make a ruling under that particular section.

The Court: I will include such a statement in my direction to the Clerk.

Mr. Van Gestel: Your Honor, may I come back to what I had said earlier? However, I think the resolution of the claim offer is purely a matter of law and I would like to file a motion (97) and a Brief so it could be heard.

The Court: I am not going to hear argument. I think it is time to, as I said before I guess in disposing of one of the motions, time to get this show on the road. That is what we are going to do. This is a Final Judgment from which an appeal can be taken.

Anything further?

Ms. Locklear: No, your Honor.

The Court: Well, I don't suppose there is that much urgency. The Clerk will, of course, forward his Judgment card or whatever he does in relation to the entry of Judgment. I want to thank Counsel again.

Stand in recess.

The Clerk will return all the exhibits to the parties who supplied them. The parties can make them available to any Appellate Court. They won't get lost again that way.

Court Clerk: Court stands in recess.

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APPENDIX C—Decision of the District Court, Dated September 29, 1983.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and the ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

Plaintiffs,

vs.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants and Third-Party Plaintiffs.

THE COUNTY OF ONEIDA, NEW YORK,

Defendant and Third-Party Plaintiff.

vs.

THE STATE OF NEW YORK,

Third-Party Defendant.

THE COUNTY OF MADISON, NEW YORK,

Defendant and Third-Party Plaintiff,

vs.

THE STATE OF NEW YORK,

Third-Party Defendant.

70-CV-35

(2) Appearances:

For the Plaintiffs: (Oneida Indian Nation of New York), Arlinda F. Locklear, Esq.

For the Defendant and Third-Party Plaintiff: (County of Oneida, *et al.*), Allan Van Gestel, Esq.

For the Third-Party Defendant: (State of New York), Robert Abrams, Attorney General of the State of New York, By: Jeremiah Jochnowitz, Esq., Assistant Solicitor General, of Counsel.

Transcript of a Decision taken on May 5, 1982, at the United States Courthouse, Auburn, New York, before the Honorable Edmund Port, United States District Court Judge in and for the Northern District of New York, presiding.

(3) The Court: All right, Miss Locklear, Gentlemen, you people have all appeared before me on previous occasions and you know that my usual custom is to dictate my Decision on the record following the argument, or following a brief interval after the argument, in order to give me an opportunity to study any new material that might have been presented during the argument.

On this occasion, I want to compliment counsel on their presentation because there was, the matter was so completely covered in the Briefs that I think it left little new for counsel to explore in the oral arguments. I don't feel it is necessary for me to write or speak very much about this. If the case requires further proceedings, as it appears it will, I am sure that the Courts above will have plenty to say. In any event, realistically we all know that all I am doing is shooting the starter's gun. The determination at the finish line will result from a Decision other than this Court's.

It makes me think of Lincoln's Gettysburg address where he said, not realizing the impact (4) of what he was saying at the time, that the world would little note nor long remember what we say here. Well. I think we can literally apply it. The important things will be said subsequently. The lawyers are intimately familiar with the background of this case; they've, some of you, have lived with it from its inception, as I have. Others are second generation. I guess the case has got a life of its own.

Very briefly, in the second part of the trifurcated trial that we had in this case, I found that the Plaintiffs were entitled to a Judgment in the sum of some $16,000-plus against, some part against the County of Oneida and part against the County of Madison for the occupation of various lands within those counties resulting from a violation of the Non-Intercourse Act of 1793.

The parties in the third phase of the trial, which we are now engaged in, which is a claimover by the Counties against the State—the parties agree that the claim based on indemnity presents no factual issues and can be decided upon (5) the two motions that are presently before me.

The Third-Party Defendant, the State of New York, relies mainly, at least, on the State's sovereign immunity and the bar of the Eleventh Amendment as grounds for the dismissal of the claim against them.

In argument, I think it is fair to say that the State concedes that absent a waiver there would be jurisdiction. I say, "Absent a waiver". I am talking about a complete waiver to sue in the Federal Courts as well as the State. As I indicated during the argument, treating the State's claims generously, I think it can be said that they further claim, or they did further claim that indemnity does not lie, although it hinged to the subject matter jurisdiction, it seems, but they seem to take the position that you are barking up the wrong tree, Counties, because you are talking about a claim that arises out of our acquisition in violation of the Non-Intercourse Act whereas in truth what you are complaining about relates to our disposition of the land rather than our acquisition. And it argues that (6) the claim is a matter of State law and not Federal law which would result in a failure of Federal jurisdiction, Federal question jurisdiction.

The County, on the other hand, lays its claim principally on three statutes, two State statutes and one Congressional enactment. They say that the State has waived its immunities through the enactment of Section 1541 of the Real Property Actions and Proceedings—does that end with an Act?

Mr. Van Gestel: Law.

Mr. Jochnowitz: Law.

The Court: —Law. And Section 10 of the State Law of New York and they additionally point to 28 U.S.C. Section 1362 as the basis of waiver. The Counties contend that it is entitled, or they are entitled to indemnification because, otherwise, the State would be unjustly enriched. They also put forward the contention that the Counties' violation found by the Court was in the nature of a technical violation resulting from their mere occupancy, possession of the (7) land, whereas the State is the real culprit having initially violated the Non-Intercourse Act as the Court found.

As I indicated, I can see, I was going to say imagine, but I won't. I can see in the State's Brief that they say there is no right to indemnification but getting down to the core of the matter, the State stresses more strongly the immunity of the State which in turn revolves on whether or not there is a waiver of immunity to this suit.

In addition to the statutes, the Counties, *en passant*, almost whispered somewhere in their Brief that a waiver could result from, and I am quoting now, "Congress acting pursuant to the authority delegated to it by the States under the Federal Constitution." *Fitzpatrick vs. Bitzer*, 427 U.S. 445 (1976) . . . or by a particular course of conduct such as engaging in interstate commerce. *Parden vs. Terminal Railroad of Alabama*, 377 U.S. 184 (1964)." Memorandum of the County in support of the Motion For Summary Judgment, hereinafter the Counties' Memo, if I (8) refer to it, at Page 9. Then lastly the Counties assert that since the Third-Party Complaint is within the ancillary as distinguished from the pendent jurisdiction of the Court, independent Federal jurisdiction is not necessary to support the third-party claim.

After a careful consideration of the Briefs and a review of the pertinent cases, I have concluded that the motion of the State to dismiss the third-party claim should be denied and the cross-motion of the Counties seeking indemnification should be granted.

Jurisdiction over the main action is unquestioned. The Supreme Court decided that. Otherwise we wouldn't even be here. The claim for indemnity obviously arises out of the same core of facts as the original claim, that is, the violation of the Non-Intercourse Act. Consequently, ancillary jurisdiction of the third-party action for indemnity exists, *Dery vs. Wyer*, 265 F.2d 804 (2nd Cir. 1959). Cited as authority in the Counties' Brief is the controlling law in this Circuit and has been consistently followed by the (9)

District Courts. *E. G. Ayer vs. General Dynamics Corporation*, 82 FRD 115 (SDNY, 1979), *Ross vs. Penn Central Transportation Co.*, 433 F. Supp. 306 (WDNY, 1977). *Aldinger vs. Howard*, 427 U.S. 1 (1976) does not destroy the jurisdiction of the Court over the indemnity claim asserted by the Counties against the State. In *Aldinger*, the Plaintiff attempted to assert an additional State-based claim against a Defendant over whom the District Court had no jurisdiction under 1983 as then construed. Section 1983, I believe it is Title 42, Section 1983. In this case, the Defendant Counties, Third-Party Plaintiffs, are asserting a claim fashioned in the mode of the Federal common law, (I believe that was the expression used by the Supreme Court) against the Third-Party Defendant State which I find has subjected itself to the jurisdiction of the Court by both the enactment of the Non-Intercourse Act by Congress and, although I don't regard it as necessary, if necessary, its consent to jurisdiction by entering into the 1795 Treaty in violation of that statute.

(10) By enactment of the Non-Intercourse Act, the Congress has abrogated the State's sovereign immunity. The State, by entering into the 1795 Treaty, has consented to subject itself to the jurisdiction of the Federal Court. I think Judge McCurn's case will support that as well. *Oneida against State of New York*, 520 F.Supp. 1278, 1307-1308.

For me, *Parden vs. Terminal Railroad Co. of Alabama*, 377 U.S. 184 (1964) points the way to this result, the States "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce", *Parden* at 191.

New York, along with the other original signatories to the Constitution, likewise surrendered a portion of their sovereignty by granting Congress the power "to regulate commerce with the Indian tribes", Constitution, Article I,

Section 8, Clause 3. Pursuant to the power granted it by the Constitution, the Congress enacted the Non-Intercourse Act of 1790. The Act has not materially changed its pertinent provisions and is now codified at 25 U.S.C. Section 177. (11) In pertinent part it provides, *"No purchase*, grant, lease or other conveyance of lands or of any title or grant thereto, from any Indian nation or tribe of Indians, shall be of *any validity* or equity" unless certain conditions were met. Now, I have underscored no purchase and any validity. It's been found that the 1795 transfer to the State violated the Act. As in *Parden*, when the Congress said, *"No purchase; any validity"*; it meant what it said and this included the purported grant by the 1795 Treaty, "When a State leaves the sphere that is exclusively its own and enters into activities subject to Congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation". *Parden* at 196.

The fact that the Non-Intercourse Act applies to New York, of course, supplies the major premise without which the Judgment in this case could not be sustained. The initial Judgment could not be sustained, if the arguments of the Counties are subsequently accepted that the Act doesn't apply to the State of New York. As the (12) Court held in *Parden* to hold the State subject to the Non-Intercourse Act but immune from suit would leave the Act meaningless; it would tear the guts right out of it, it seems.

To paraphrase *Parden*, "It would be a strange situation indeed if he State could be held subject to the"—I am inserting Non-Intercoourse Act—"and liable for a violation thereof and yet they could not be sued without its expressed consent. The State by"—and again I am interjecting, procuring the conveyance of the land from the Oneidas so that rephrased *Parden* would read, "The State by procuring the conveyance of land from the Oneidas and thereby subjecting itself to the Act must be held to have waived

any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent", citing *Maurice vs. State*, 43 California Appellate 2d 270 at 275-277, 110 P. 2d 706 at 710-711. In my view the fact that Alabama was operating a railroad business for profit in the *Parden* case doesn't dilute its authority.

In *Fitzpatrick vs. Bitzer*, 445 U.S. 445 at (13) 451-452 (1976), the Court in distinguishing Edelman said, "Edelman went on to hold that Plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as *Parden vs. Terminal Railroad Company*, 377 U.S. 184 (1964), and *Employees vs. Missouri Public Health Department*, 411 U.S. 279 (1973), because the necessary predicate for that doctrine was Congressional intent to abrogate the immunity conferred by the Eleventh Amendment". The fact that it happened to be the railroad business I think was just a coincidence.

Congress by its enactment of the Non-Intercourse Act and its subsequent re-enactment after the adoption of the Eleventh Amendment, clearly evidences an intent to avoid the amendment's immunity.

As I indicated before, I think under the circumstances disclosed, the provision of the Constitution giving Congress the power to regulate trade with the Indians and the subsequent enactment and re-enactmens of the Non-Intercourse Act indicate that New York's consent to this (14) waiver isn't even necessary. Nevertheless, New York has by its conduct consented to jurisdiction in the Federal Court. Consent can be inferred from New York's treaty with the Oneidas. The treaty was executed on September 15th, 1795, about nine months after the ratification of the Eleventh Amendment. As a matter of fact, the State of New York was the first state to ratify the Eleventh Amendment so they quite apparently had a keen interest in the amendment which developed.

Kentucky was the ninth state providing the three-quarters of the states necessary to enact the Eleventh Amendment and they ratified the amendment on December 7th, 1794. At *that* time the amendment, of course, was effective under the Constitution. Article V, *Dillon vs. Gloss*, 256 U.S. 368 (1921), held quite clearly that the amendment becomes effective in accordance with the express language of the Constitution upon its ratification by three-quarters of the states.

Now, peculiarly in looking for the effective (15) date of the amendment, it appears that it was, I guess, years, a couple of years later before the President proclaimed the amendment had been ratified by three-quarters of the states. But without going into the question of the timing I think it is indicative of New York's consent. Particularly treating the earlier action, the ratification date as December 7th, 1794. It would not materially affect the consent even treating the President's proclamation as the date of the amendment because I think the inference at that time under the old Chisholm case making the Eleventh Amendment necessary would pretty much tell the State that they were subject to jurisdiction of affairs concerning trade with the Indians.

And, incidentally, as my predecessor used an expression, he wouldn't pound the table, and I wouldn't pound the table about this Decision, either. I think it's a very murky area that probably is deserving of much greater study in depth than was afforded either in the presentation or determination of these motions.

(16) In view of my Decision, it really isn't necessary to say much, if anything, about the other statutory alleged bases for a waiver. Section 1541 and Section 10,—I think there was so much emphasis laid on them in the Briefs that I should comment even though briefly about them.

In Section 1541, the State of New York waives its immunity in an action brought by a person claiming an estate

or interest in real property to compel the determination of any *claim adverse to that of the Plaintiff* which the Defendant makes or which the Defendant might make. The State maintains the waiver is inapplicable since the claim brought against it is not within the purview of the section. To my thinking, I think the State is clearly correct on the plain language of the statute. It doesn't appear, or it hasn't appeared to me in all the years that I have been connected with this case that the State makes a claim adverse to the Counties at all. I think they were as solid as a block of granite up to this motion. They both claimed that the (17) State had a valid title and that the State had a valid conveyance from the Oneidas on a number of grounds.

Then the Counties concede, contrary to their position, that this Circuit in *Oneida vs. New York*, 443 F.2d 415 (Second Cir., 1971) holds that Section 1541 "Did not constitute consent by the State of New York to be sued in Federal Courts", Counties' Memo Pages 18, 19. They adjure me to disregard Knight because Judge Friendly "noted in his Opinion that the parties had not argued the question: 'in their exceedingly unhelpful Briefs'." They further assert that, "Had he been afforded the benefit of a full adversarial presentation of the issue, it's quite likely he would have reached the opposite result". Counties' Memo Page 19. I can't agree with either conclusion. Judge Friendly pointed out that the parties had omitted from their "exceedingly unhelpful Briefs" a stronger basis than that presented for excluding the action from the reach of the Eleventh Amendment so he immediately set himself up as sort of counsel; he presented (18) the argument. Then he set himself up as a Judge and considered the argument and said that it wouldn't hold.

Now, I think the Counties know that I can't and wouldn't disregard Knight as cavalierly as they indicate I should. A Decision of the Court of Appeals in this Circuit

is not persuasive to the District Court; it is binding on it. *Hurley vs. Hurley*, 40 N.Y. 2d 78 (1980), does not alter the situation, either. Hurley merely held that the part of the Complaint within Article XV could be maintained in the New York Supreme Court but that the counts seeking damages would have to be relegated to the Court of Claims. I read *Hurley* a couple of times and nowhere in *Hurley* do I, can I find that Section 1541 constitutes a waiver of the bar of the Eleventh Amendment to a suit in the Federal Court.

Counsel also rely on Section 1362. I agree with Judge McCurn that 1362, 28 U.S.C. 1362, would form the basis for jurisdiction in an action under that section, but I don't have to rely nor do I rely on that section as the basis of this Decision.

(19) Section 10 of the New York State Law can be disposed of almost summarily. It is without any judicial gloss. Apparently there have been no cases in the Court, at least no reported cases. From the plain language of the section it seems that the Legislature meant to apply it to actions brought, as one of the conditions, brought for the recovery of land.

Now, the Plaintiffs in this case very pointedly throughout the litigation made it clear that they were not seeking the recovery of land. In one of my earlier Decisions, I distinctly remember crediting the Oneidas and praising them for the, I would say, delicate manner in which they sought to have this question determined with as little disruption as possible. Subsequent cases, when the silk glove didn't work and mailed fists become the mode of the day, sought less peaceable ways of resolving Indian land conflicts. I think the very fact that this was not an action for the recovery of land, certainly in the absence of any judicial gloss on Section 10, excluded it from the coverage of that section. The Legislature (20) could certainly be sustained in their judgment if they sought to

cover a situation where the disruptions attendant to an action to recover land was brought and not one which they could reasonably regard as less disrupting where damages only are sought so that—then go one step further. It's hard for me to conceive that even assuming *arguendo* as the Counties do that Section 10 constitutes a waiver of the State's immunity to sue, it still falls far short of a waiver of the Eleventh Amendment to suits in the Federal Courts. This is one of the rare times when I think that I have taken longer to state my so-called brief reasons on the record than counsel have taken in presenting their arguments. That in no way reflects on the sufficiency of the arguments because as I indicated earlier the Briefs presented everything that certainly was necessary; that certainly was helpful to the Court.

I thank counsel for their Briefs.

Now, there is one thing accordingly as I indicated, I find that the motion of the State (21) to dismiss should be denied. The motion of the Counties is granted.

Judgment should be entered in favor of the Counties and against the State.

Off the record.

(Discussion off the record.)

The Court: I direct, if it meets with everyone's satisfaction, I think that this is probably the best way to do it—to resolve the question of the entry of Judgment in accordance with the Decision—if I direct in my Order granting the Third-Party claims Summary Judgment in favor of the Counties and denying the motion of the State that I direct that the attorney for the Counties prepare and present to Mr. Jochnowitz a Proposed Judgment. If you are unable to agree on the form of a Judgment, then present it to the Court within fifteen days; that Judgment can be settled on three days' notice, or if you need longer, five days' notice.

(Conclusion of Proceedings.)

Appendix D.—Decision of the Court of Appeals, Dated September 29, 1983.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 545, 546, 643—August Term, 1982

Argued: January 18, 1983 Decided: September 29, 1983

Docket Nos. 82-7436, 82-7486, 82-7526

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA INDIAN NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Plaintiffs-Appellants-Cross-Appellees,

—against—

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants-Third Party Plaintiffs-Appellees-Cross-Appellants,

—against—

STATE OF NEW YORK,

Third Party Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,

Circuit Judges.

Appeal from an order of the United States District for the Northern District of New York, Edmund Port, *J.*, holding the Counties of Oneida and Madison, New York liable to the Oneida Indian Nation under the Trade and Intercourse Act of 1793, awarding the Oneida Indian nation $16,694 against the two Counties, and finding that the State of New York must indemnify the Counties for all damages assessed against them.

Affirmed and remanded for a recalculation of damages.

Judge Meskill dissents in a separate opinion.

ARLINDA LOCKLEAR, Esq., Washington, D.C. (Lawrence Aschenbrenner, Esq., Native American Rights Fund, Washington, D.C., Francis Skenandore, Esq., Oneida, Wisconsin, Norman Dorsen, Esq., New York, N.Y., *of counsel*), *for* Oneida Indian Nation of Wisconsin and Oneida of the Thames Band.

BERTRAM E. HIRSCH, Esq., Floral Park, N.Y., *for* Oneida Indian Nation of New York.

JEREMIAH JOCHNOWITZ, Assistant Solicitor General, Albany, N.Y. (Robert Abrams,

Attorney General of the State of New York, Peter H. Schiff, Acting Attorney in Chief Appeals and Opinions, Albany, N.Y., *of counsel*), for State of New York.

Allan van Gestel, Esq., Boston, Massachusetts, (Jeffrey C. Bates, Esq., Laura L. Carroll, Esq., Goodwin, Proctor & Hoar, Boston, Massachusetts, *of counsel*), for County of Oneida, New York, and County of Madison, New York.

Robert T. Coulter, Esq., Washington, D.C. (Curtis G. Berkey, Esq., Steven M. Tullberg, Esq., Indian Law Resource Center, Washington D.C., *of counsel*), for Amicus Curiae The Houdenosaunee.

Lumbard, *Circuit Judge*:

All three parties appeal from the judgment of the Northern District of New York, Edmund J. Port, *Judge*. The defendants, Counties of Oneida and Madison, New York, appeal from Judge Port's decision holding them liable for wrongful possession of plaintiffs' land. 434 F. Supp. 527 (N.D.N.Y. 1977). Plaintiffs Oneida Indian Nation of New York State, Oneida Indian Nation of Wisconsin, and Oneida of the Thames Band Council (collectively the "Oneidas"), as well as the Counties appeal from Judge Port's decision of October 5, 1981, on damages. Finally, third party defendant State of New York appeals from Judge Port's ruling of May 5, 1982, that it must indemnify the Counties for any damages

assessed. We affirm each of Judge Port's three rulings, but remand for further proceedings on the calculation of damages.

The three plaintiffs in this case are the descendants of the Oneida Indian Nation which inhabited central New York for many years until shortly after the Revolutionary War. The Oneidas were part of the Six Nations or Iroquois, the most powerful tribe in the Northeast.[1] Their land extended from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains.[2] During the Revolutionary War, the Oneidas were active allies of the colonists against the British. Their support prevented the Iroquois from taking a unified stand against the colonists—an important achievement for the confederated states.

After the War, the United States rewarded the Oneidas in the Treaty of Fort Stanwix, 7 Stat. 15 (October 22, 1784), by securing them "in the possession of the lands on which they are settled." Later, two additional treaties further secured the Oneidas in the possession of their land. *See* Treaty at Fort Harmar, 7 Stat. 33 (January 9, 1789); Treaty with Six Nations, 7 Stat. 44 (November 11, 1794). The settlers of the new nation, however, in their constant fever to expand soon invaded the Indians' territory. Thus, under increasing pressure from its white residents, the State of New York in 1788 purported to

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1 The Iroquois were composed of six tribes: the Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora.

2 Earlier in their history, before the influx of settlers, the Iroquois' land "extended from the hills of New England to the Mississippi River and from upper Canada into North Carolina." F. Cohen, *Handbook of Federal Indian Law* 417 (University of New Mexico Press reprint of 1942 ed.) (*Federal Indian Law*).

purchase most of the Oneidas' land nearly five million acres.[3] The Oneidas retained about 300,000 acres near Oneida Lake.

As the pressure of new settlements everywhere continued to increase, the Indians became restive. In recognition of the frequently inequitable land purchases and to prevent Indian retaliation, the newly created federal government took an active role in protecting and securing the Indians in the possession of their land. President Washington and his Secretary of War, Henry Knox, encouraged Congress to enact legislation which recognized "that the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not be divested thereof, but in consequence of fair and bonafide purchases, made under the authority, or with the express approbation, of the United States." *American State Papers*, 1 *Indian Affairs* 53 (1834). Accordingly, Congress passed the Trade and Intercourse Act of 1790, Ch. 33, 1 Stat. 137 (hereinafter "1790 Act") which provided:

> [t]hat no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a [federal] license . . . [and] [t]hat no sale of land made by Indians . . . shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id. at 137-38.[4]

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3 Much of this land is presently the subject of another lawsuit, *see Oneida Indian Nation of New York v. New York*, No. 78-104 (N.D.N.Y. filed December 5, 1979).

The 1790 Act, however, was primarily declarative. It provided few enforcement mechanisms for protecting federal or tribal interest. Because it did little to stem the increasing illegal occupation of Indian lands, Congress in 1793 enacted a second Trade and Intercourse Act that added criminal penalties for illegally occupying Indian lands and authorized the President to remove trespassers from the land. Trade and Intercourse Act of 1793, Ch. 19, § 8, 1 Stat. 329, 330-31 (hereinafter "1793 Act"). The 1793 Act also provided that "informants" could enforce the section imposing fines on violators and collect one-half of the fine assessed.

Despite these statutory prohibitions, the State of New York attempted in 1795 to obtain Indian lands without the requisite federal approval. Throughout the ensuing months, the federal authorities repeatedly urged New York State Governor Clinton and his successor Governor John Jay to seek and secure the appointment of federal commissioners before the State negotiated any purchase of Indian lands. *See* 434 F. Supp. at 534-35. Despite this, the State sought an agreement with the Oneidas during the summer of 1795, over the express remonstrance of the federal authorities. *See id.* at 534. These negotiations led to the sale on September 15, 1795, in Albany, in contravention of the 1793 Act, of approximately 100,000 acres of the Oneidas' reservation. As the district court noted, however, the circumstances surrounding the Oneidas' assent to the purchase were fraught with irregularities. *Id.* 535. First, the Oneidas virtually never signed treaties outside their aboriginal land, yet the treaty was

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4 Section four of the 1790 Act states in full:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

signed in Albany outside their aboriginal land boundaries. Second, normally the Oneidas' treaties were agreed to by unanimous consensus of the tribe; here, however, powers of attorney were given to individuals, none of whom were chiefs, to negotiate the transaction. Third, the State purchased the land for approximately fifty cents per acre. Within two years, the State in turn sold much of the land to white settlers for about $3.53 per acre.

Social and economic forces, including poverty, famine, alcoholism, and pressures on the Oneidas to move West resulted in the alienation of virtually all of their remaining New York acreage. Between 1795 and 1846, twenty-five more treaties between the State and the Oneidas were consummated, enabling the State to divest the Oneidas of all but a few hundred acres. Only two of these treaties (concerning land not here in question) were made with federal supervision and approval.[9] Furthermore, the State passed a statute that divided up the tribal landholdings and gave individual Indians a right to sell.

New York's abuse of the Oneidas was not accomplished without protest. Shortly after the 1784, 1787, and 1788 land purchases, the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. *See American State Papers*, I *Indian Affairs* 139 (1834). Their protest continued, especially between 1840 and 1875, and between 1909 and 1965. *See* 434 F. Supp. at 536.

Finally, in 1970 the Oneidas brought suit in the Northern District of New York claiming that the 1795

[9] It has been estimated that the "State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government." *Federal Indian Law* at 420 n.24.

cession of land violated the Nonintercourse Act, and that the land was unconscionably purchased for an inadequate price. The complaint sought damages for the fair rental value of 871.92 acres which were part of the 1795 land transfer, for the period from January 1, 1968 to December 31, 1969. The district court on November 4, 1971, dismissed the complaint ruling that it asserted only a state law claim. Our affirmance over one judge's dissent, 464 F.2d 916, 918 (2d Cir. 1972), was unanimously reversed by the Supreme Court which held:

> Tribal rights [are] entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the 'power of Congress . . . is supreme.'
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> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.

414 U.S. 661, 669-70 (1974) (footnotes and citation omitted).

On remand, Judge Port trifurcated the proceedings, dividing the case into separate trials on the issues of liability, damages, and indemnity. First, Judge Port held that the State's 1795 purchase violated the 1793 Act. He later assessed the Counties $16,694 in damages plus interest. In addition, Judge Port over the State's principal objection on eleventh amendment grounds held that the State must indemnify the Counties for all damages assessed.

I.

LIABILITY

Plaintiffs claim two bases for a finding of liability in this case: federal common law and the 1793 Nonintercourse Act.[6]

(A) *Federal common law.*

The Counties assert that the Oneidas had no federal common law rights at the time of the 1795 purchase, and alternatively that whatever common law action there may have been was preempted by the Trade and Intercourse Act. We reject both contentions.

The interrelationship of the Indian nations and the United States—including its constituent states—early in the new nation's history was recognized as involving uniquely federal interests. The Constitution reflected this concern by delegating to the federal government the authority to "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This federal interest in regulating Indian affairs was enunciated not only in treaties, *see, e.g., Treaty of Fort Stanwix*, *supra*, and statutes, *see, e.g.*, Trade and Intercourse Act of 1790, *supra*, but also in the recognition by the courts of the availability of a federal common law action to vindicate Indian land claims. The Supreme Court referred to this proposition in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), one of its earliest cases involving the transfer of Indian land. Although the case involved a title dispute

[6] Judge Port found a violation of the Trade and Intercourse Act of 1793. In formulating a remedy however, he looked to the common law.

between non-Indians, the Court subsequently interpreted the case to stand for the general principle "that no actions in ejectment could be maintained on an Indian right to occupancy and use . . . . . This is the result of the decision in *Johnson v. M'Intosh*." *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850). Furthermore, the Court repeatedly has emphasized that this Indian right to occupancy and use is a federal right. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 670 (1974) (it is a "rudimentary proposition" that after the Constitution was "adopted, these tribal rights to Indian lands became the exclusive province of the federal law."); *see also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 626 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981) ("the extinguishment of all Indian title was meant to be a matter of federal concern"). In the prior appeal in this case, the Supreme Court alluded to the existence of a common law action on several occasions in mandating the exercise of federal jurisdiction. "[A] tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.' . . . nevertheless [it is] entitled to the protection of federal law . . . ." *Oneida Indian Nation*, 414 U.S. at 669, quoting *U.S. v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941). "Absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. We conclude that the Oneidas may assert a federal common law action to recover damages for the Counties' wrongful possession of their land.

The Counties, however, argue that this federal common law action was preempted by the enactment of the Trade and Intercourse Act. They cite *Milwaukee v. Illinois*, 451 U.S. 304 (1981), in which the Supreme Court held that a

subsequently enacted federal statute preempted the federal common law cause of action it previously had upheld in *Illinois v. Milwaukee*, 406 U.S. 91 (1972). In *Illinois v. Milwaukee* the Supreme Court recognized the existence of a federal common law action for abatement of a public nuisance in polluted interstate waters. Nine years later, however, the Court found in *Milwaukee v. Illinois* that such an action could no longer be maintained. In the intervening years, Congress had passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter "FWPCA"). Under these lengthy amendments and their appurtenant regulations, it is illegal for anyone to discharge pollutants into American waters without a permit. 33 U.S.C. §§ 1311, 1342. (1976 ed. & Supp. III). Moreover, the discharge permitted is restricted to effluent limitations established by Environmental Protection Agency regulations. The statute provided for dual enforcement both by the federal government and by citizen suits. *See id.* §§ 1319 & 1365. It specifies the relief that may be obtained, the ranges of monetary penalties for various violations, and authorizes imprisonment in certain cases. *Id.* § 1319(c). Other aspects of the statute include grants for research, water treatment works, and water pollution standards. *See generally id.* §§ 1251 et seq. Under these circumstances the Court concluded that "Congress ha[d] not left the formulation of appropriate [pollution] standards to the courts . . . but rather ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee v. Illinois*, 451 U.S. at 317. Thus, when Congress "speaks directly to a question," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), that originally "rested on federal common law, the need for such an

unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. at 314.

This case is quite different. The Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. Rather, the Acts augmented the protection of Indian property rights previously afforded by federal common law by adding an additional statutory prohibition. This statute, *inter alia*, voided all land transactions in which Indians were a party that were consummated without federal approval. Furthermore, the 1793 Act both authorized the intervention of the President and the federal government on behalf of the Indians, and established criminal penalties for violations of the Act.[7] None of these statutory provisions expressly subsumed the common law modes of relief. There is no evidence to suggest that Congress intended to deny common law remedies to the Indians. In an analogous area involving congressional extinguishment

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7 Sections eight states in full:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

of Indian land titles, the Supreme Court has stated that evidence of such congressional intent should be "plain and unambiguous," and would "not be lightly implied in view of the avowed solicitude of the Federal Government for the Welfare of its Indian wards." *U.S. v. Santa Fe Pacific*, 314 U.S. at 346, 354. Neither should we imply a congressional intention to extinguish the Indians' common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire. Accordingly, we hold that the district court had jurisdiction to grant relief under federal common law.

(B) *Trade and Intercourse Act.*

Judge Port premised liability in large part on the State's violation of the 1793 Trade and Intercourse Act. On appeal, the State apparently does not question Judge Port's holding that the Act was violated. The 1793 Act explicitly required federal approval of a land purchase such as the 1795 cession. No such federal approval was obtained. The Counties, on the other hand, proffer five arguments in seeking to avoid liability: first, that the Trade and Intercourse Acts did not provide for a private suit for the enforcement of their provisions; second, that if such a suit could be maintained it abated upon expiration of the 1793 Act; third, that the Oneidas' claims are barred by the statute of limitations; fourth, that the claims are non-justiciable, and fifth, that the federal government subsequently ratified the 1795 transaction.

Implied Cause of Action.

It is beyond dispute that the Nonintercourse Acts were enacted for the protection of Indian tribes as beneficiaries. However, "the focus of [our] inquiry is on

whether Congress intended to create a remedy." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). In resolving that question the Supreme Court has recently given us guidance:

> Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change. When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.
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> In view of the absence of any dispute about the proposition prior to the decision of *Cort v. Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the 'contemporary legal context' in which Congress legislated in 1974. *Cf. Cannon v. University of Chicago*, 441 U.S., at 698-699.

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-75, 381 (1982).

When, prior to *Cort v. Ash*, 422 U.S. 66 (1975), an implied private remedy was part of the "contemporary legal context" in which Congress legislated, Congress will be deemed to have intended to preserve the remedy. *Id.*,

379-80; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

Application of these basic principles leads us to the conclusion that in enacting the Nonintercourse Acts Congress must have expected that they would be enforced by private actions since they were clearly intended for the benefit of the Indian tribes. The federal statutory structure was extremely simple and had not even approached the complexity which led to the adoption of the *Cort v. Ash* requirements. Indeed, the right to enforce the Acts through private actions has been assumed by various lower federal courts. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 805 & n.3 (D.R.I. 1976). Private enforcement has also been favored because of the federal government's poor performance of its statutory obligation to protect the Indians.[9] The congressional directives embodied in the Nonintercourse Acts frequently have been disregarded by the executive branch. *See, e.g., Narragansett Tribe*, 418 F. Supp. at 806 & n.4. Thus, by necessity, Indian tribes have been permitted to enforce the

[9] *See, e.g., United States v. Arkansas Irrigation District*, 336 F.2d 101 (8th Cir. 1958), *cert. denied* 352 U.S. 988 (1957):

> The numerous nonchimerous expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting "the generous and protective spirit which the United States properly feels towards its Indian wards," *Oklahoma Tax Comm. v. United States*, 319 U.S. 598, 607, 63 S. Ct. 1284, 1289 87 L.Ed. 1612, and the " 'high standards for fair dealing' required of the United States in controlling Indian affairs," *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 67 S. Ct. 167, 170, 91 L.Ed. 29 are but demonstrations of a gross statutory hypocrisy

Acts. In any event we believe that under conventional *Cort v. Ash* analysis, the Indians have an implied private cause of action to enforce the Nonintercourse Acts' proscriptions.

Cort v. Ash, 422 U.S. 66 (1975), outlines four factors to be used in determining whether Congress has intended that individuals may bring private suits to enforce a particular statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original). We consider these four factors in that order.

(1) *Beneficiaries.*

The language and purpose of the 1793 Act are unequivocal in their purpose to protect the Indians. Section 1 provides that "no person shall be permitted to carry on any trade or intercourse with the Indian Tribes without a [federally granted] license . . . ." 1 Stat. at 329. Violators of the Act "shall forfeit all the merchandize offered for sale to the Indians," and they also may be imprisoned, and fined up to $1,000. *Id.* §§ 3 & 5, at 329-30. Furthermore, "no purchase or grant of lands . . . from any

[indians [without federal approval] shall be of any validity . . . ." *Id.* at § 8, at 330-31. The statute's purpose was "to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties . . . ." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979) ("a major purpose of these acts as they developed was to protect the rights of Indians to their property").

(2) *Legislative history.*

The legislative history of the Nonintercourse Acts, which is sparse and incomplete, furnishes no clear expression on the question of whether Congress intended to create a private right of action for damages. Congressional committee reports generally are unavailable, and floor debates were seldom recorded. The absence of legislative history is neither unusual nor fatal. "The legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Nonetheless, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979). "[C]ongressional intent can be inferred from the language of the statute, the statutory structure," *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981), "or in the circumstances of [the statute's] enactment." *Transamerica*, 444 U.S. at 18. *See also Cannon v. University of Chicago*, 441 U.S. at 688-99; *California v. Sierra Club*, 451 U.S. 287, 296 n.7 (1981).

The circumstances surrounding the enactment of the 1793 statute show that Congress intended to provide **maximum protection of Indian land—and that this protection included the power to commence a private action.**[9] **The** earlier 1790 Act in large part was due to the efforts of **President George Washington and his Secretary of War, Henry Knox. Both men were "of high integrity and had** extensive experience in Indian affairs." F. Prucha, *American Indian Policy in the Formative Years*: The **Indian Trade and Intercourse Acts of 1790-1834 at 43-44 (1962) (hereinafter "*American Indian Policy*"). President** Washington personally appeared before Congress and **warned that legislation was needed to bolster the faltering** relations with Indian Tribes. *See Sen-Exec. Journal*, 1st. Cong., 1st Sess. 20-24 (1789); 1 *Annals of Congress* 933 (1790).[10] Secretary Knox urged that if it were "declared **by law . . . that the Indians possess the right to all their** territory which they have not fairly conveyed, and that **they should not be divested . . . [except by] treaties made under the authority of the United States, the foundation**

[9] We reject the State's initial contention that Indian tribes lacked capacity to sue in federal court, and thus Congress could not have intended to create a private cause of action on their behalf. Although suits by tribes may have been rare the reasons for this were cultural, not legal:

> Except for the Cherokee, who had experienced some intermarriage and infusion of Anglo-American legal concepts, the tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible.

Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 46 (1979).

[10] As Secretary Knox said in a letter to North Carolina Governor Blount, quoted in *American Indian Policy* at 41: "The Indians have constantly had their jealousies and hatreds excited by the attempts to obtain their land."

of justice and peace would be laid." *American State Papers*, 1 *Indian Affairs* 53 (1834). The 1790 Act which followed embodied these "principles of justice and moderation, as [would] enforce the approbation of the dispassionate and enlightened part of mankind . . . [and it represented a policy of] conciliation of the Indians by negotiation . . . liberality, express guarantees of protection . . . and developed trade." *Id.* at 41, 44.

Section 4 of the 1790 Act stated that "no sale of lands made by any Indians . . . shall be valid . . . unless the same shall be made . . . under the authority of the United States." 1 Stat. at 138. Section 4's prohibition against non-federally approved Indian land sales did not carry with it any substantive penalties for its violation,[11] nor were there any mechanisms for enforcing its prohibition. Nonetheless, Congress must have intended that section 4 would be enforced by some party or institution. *See Transamerica*, 444 U.S. at 18-19. In *Transamerica*, the Supreme Court construed a securities' statute that was constructed similarly to the 1790 Act. Section 215 of the Investment Advisors Act of 1940 states that all waivers of compliance and "[e]very contract made in violation of any provision of this subchapter . . . shall be void. . . ." 15 U.S.C. § 80b-15. Like section 4 of the 1790 Act, 80b-15 simply declared that certain transactions were void. It did not explicitly provide for enforcement. Under these circumstances, the Supreme Court found that Congress intended a private right of action to enforce section 80b-15.

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[11] Sections 2 and 3 which dealt with licensed traders, on the other hand, expressly included enforcement by the United States and perhaps by "informants" suits. *See* 1 Stat. at 138-39.

> By declaring certain contracts void, [section 80b-15] by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that [section 80b-15] could be raised defensively in private litigation to preclude the enforcement of an investment advisors contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.
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> For these reasons we conclude that when Congress declared in [section 80b-15] that certain contracts were void, it intended that the customary legal incidents of voidness would follow.

Transamerica, 444 U.S. at 18, 19.

By analogy, if the State violated the 1790 Act, logically the Indians would have had "the customary legal incident" of a private right of action to enforce its strictures. With no express enforcement provisions accompanying section 4, a statutory interpretation that did not permit a private right of action would render section 4 unenforceable.

As the 1790 Act was set to expire in 1793, Congress passed the Trade and Intercourse Act of 1793 in which section 8 incorporated the original language of the 1790 Act which had voided all Indian land transactions negotiated without federal approval. In addition, it provided that violation of the section was a misdemeanor punishable by a fine and imprisonment.[12] The statute also

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[12] Violation of the 1793 Act was punishable by a fine up to $1,000 and imprisonment not to exceed twelve months. 1793 Act § 8, 1 Stat. at 330.

authorized the executive branch, at the discretion of the President, to remove violators from Indian land. Other sections regulating trade with the Indians also were added to the Act, with penalties for their violation."

These upgraded remedies were designed to correct the perceived shortcomings of the 1790 statute. The 1790 Act had failed to protect the Indians adequately from predatory encroachment, trade, and land purchases. President Washington had urged Congress in his 1791 annual address to enact an "efficacious provision . . . inflicting adequate penalties upon all those who, by violating [the Indians'] rights, shall infringe the treaties and endanger the peace of the Union." 'Third Annual Address, President George Washington,' 1 *Messages and Papers of the Presidents*, 105 (Richardson, ed., 1896). He renewed his plea in late 1792 stating, "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier

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[1] The significant additions to the Trade and Intercourse Act included: Section one prohibited trade with Indians without a federally granted license. To obtain such a license, a licensee had to submit a $1,000 bond. Section two permitted the recall of the license, as well as recourse to the bond for any breaches of conditions placed on the licensee. The third section penalized unlicensed trading with Indians by imposing forfeiture of the merchandise traded, and a fine and imprisonment up to $100 and 30 days respectively. Crimes committed against Indians on Indian land were to be treated as if committed on non-Indian land under section 4. Section 5 proscribed settlement on Indian land with an attendant fine between $100 and $1,000 and imprisonment not to exceed twelve months for any violations of the section. The President was also authorized to remove unlawful settlers. Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory," and provided that persons purchasing horses without such a special license would forfeit both the horse and a sum not more than one hundred dollars, nor less than thirty dollars. One half of the forfeiture would be distributed to the prosecuting "informant" and one-half would go to the federal government.

. . . ." Speech of President George Washington, 2d Cong., 2d Sess., November 6, 1792, 1 *American State Papers: Indian Affairs*, at 119. In response, Congress enacted the more stringent 1793 statute, to increase the law's effectiveness through additional enforcement mechanisms. There is no suggestion that Congress intended to subtract from the statutes' remedies. Accordingly, we agree with the district court that the private right of action that existed under the 1790 Act remained intact in the 1793 Act.

Our conclusion that Congress intended that private parties would have a cause of action to enforce the 1793 Act is further supported by other evidence of congressional intent. For example, in 1822 Congress amended the Trade and Intercourse Act of 1802—which essentially continued the 1793 Act's land alienation provision—to place the burden of proof on white persons in all cases in which Indians were parties. 3 Stat. 683 (1822). This pertained to "all trials about the right of property in which Indians shall be party on one side, and white persons on the other." *Id.* This provision only makes sense if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants.

Furthermore, the 1793 Act's misdemeanor provison only appears to apply to "negotiators" of Indian land cession transactions. The State, rather than Counties, thus would appear to be subject to the criminal penalties of the statute. *Cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). Without the availability of a private right of action against the Counties the only remedy would be the executive's discre-

tionary removal of violators."[9] Presidential authority to remove intruders even when exercised, however, often proved ineffectual. *American Indian Policy* at 158-66. Thus, absent a right of action, the Oneidas would have a right under a statute that was unenforceable. For all these reasons, we conclude that Congress intended that Indian litigants could bring private suits to enforce the 1793 Act's prohibition of certain land cessions."

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[9] *Cf. Pueblo of Isleta v. Shell Oil Co.*, 390 U.S. 365, 374 (1968):

> [T]he general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment. Furthermore, the Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." H.R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that Indian's right to sue should not depend on the good judgment or zeal of a government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue under the oil and gas lease.

(footnote omitted).

[10] The only remnants of legislative history available indicate that President Washington, who was the moving force behind the 1790 and 1793 Acts, thought that they permitted the Indians to bring private causes of action. Cornplanter, Chief of the Seneca Indians, another tribe of the Six Nations, had met with President Washington in December 1790 to protest their complaints about certain land transactions entered into during the prior decade. *American State Papers*, I *Indian Affairs* 139 (1834). Washington assured Cornplanter that at least after 1790, "the case [was] entirely altered, . . . any treaty formed and held without [the federal government's] authority [was] not binding." *Id.* Moreover, "[i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." *Id.* This speech was printed and communicated to Congress on January 11, 1792. *Id.* 142-43. Congress, therefore, was made aware of President Washington's perception of the reach of Indian law.

(3) *Statutory Purpose.*

The purposes of the 1793 Trade and Intercourse Act are best served by the implication of a private right of action. "[A] major purpose of the Acts as they developed was to protect the rights of Indians to their properties." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979). *See also U.S. v. Southern Pacific Transportation Co.*, 543 F.2d 676, 697 (9th Cir. 1976) (the statute was meant to "prevent the steady diminution of Indian territory . . . unless . . . by public treaty."). The Supreme Court has stated that it is "decidedly receptive" to the implication of a "private remedy [that] is necessary or at least helpful to the accomplishment of the statutory purpose . . . ." *Cannon v. University of Chicago*, 441 U.S. at 703. A private right of action is necessary in view of the virtually complete failure of other statutory remedies to provide the Indians with any real protection. *See United States v. Alabama Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); *American Indian Policy* at 147, 158-66.

(4) *Federal or State Concern.*

As stated above the Indians have a federal common law possessory cause of action. Moreover, it is well settled that laws affecting the Indians are principally the province of federal, not state law. *See, e.g., Oneida Indian Nation*, 414 U.S. at 669; *Hughes v. Washington*, 389 U.S. 290, 292-93 (1967); *Board of Commissioners v. United States*, 308 U.S. 343, 350-51 (1939); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Thus, all four prongs of the *Cort v. Ash* test have been met. Accordingly, we hold that the Oneidas had a private

right of action to enforce the Trade and Intercourse Act of 1793. We now turn to defendant's other arguments.

Abatement of the Cause of Action.

The Counties argue that even if the Oneidas could have brought suit under the 1793 Act, that cause of action has since abated. The 1793 Act expired after "two years, and from thence to the end of the then next session of Congress . . ." 1 Stat. at 332. Appellants assert, quoting *The General Pinkney*, 9 U.S. 5 (Cranch) 281, 283 (1809), that after the termination of the 1793 Act, "no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force unless some special provision be made for that purpose by statute." We disagree. The pertinent provision of the 1793 Act remains operative. 25 U.S.C. § 177 (1983) states that "[n]o purchase . . . of lands . . . from any Indian nation or tribe of Indians shall be of any validity . . . unless same be made by treaty . . . under the authority of the United States." Under these circumstances, "the better and prevailing rule is that so much of the original act as is repeated in the later statute without substantial change is affirmed and continued in force without interruption." *Great Northern Ry. Co. v. United States*, 155 F. 945, 948 (8th Cir. 1907). Abatement is inapplicable according to this proposition because the underlying rationale of abatement is inapposite. Abatement "[i]mputes to Congress an intention to avoid inflicting punishment at a time when it would no longer further any legislative purpose. . . ." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). Because the 1793 statute remains essentially in force in 25 U.S.C. § 177, the continued invalidity of the illegal transactions would "further a legislative purpose," namely, protection of Indian land title.

Miscellaneous Objections to Liability.

Appellants raise three other arguments against liability: the statute of limitations, non-justiciability, and subsequent federal ratification of the 1795 transaction.

(1) *Statute of Limitations.*

Appellants claim that this suit, instituted 175 years after the cause of action accrued is time-barred. We disagree. State statutes of limitation are inapplicable. As we recently emphasized, in cases involving Indian land claims "[d]efenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected." *Mohegan Tribe v. State of Connecticut*, 638 F.2d at 614-15 & n.3. Moreover, state statutes of limitation are not borrowed "if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). Applying New York's statute would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts. In addition, we have recently rejected the assertion that such actions are time-barred noting that "[i]t is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses. It would be anomalous to allow the trustee to sue under more favorable conditions that those afforded the tribes themselves." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083-84 (2d Cir. 1982) (citation omitted).

Suits brought by the United States on behalf of Indian tribes are governed by the special statute of limitations set forth in 28 U.S.C. § 2415 which provides some guidance in the present situation. Under section 2415(c) there is no

time limitation if the action is to "establish the title to, or right of possession of, real or personal property." Sections 2415(a) provides that actions in contract seeking money damages that accrued prior to July 1966 are timely if filed prior to December 31, 1982. Thus, had the United States brought the instant suit in 1970 instead of the Oneidas, it would not have been time-barred. We conclude that "at the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States." *Id.* at 1084

(2) *Justiciability*

Appellants advance several reasons in support of their assertion that the Oneidas' claims present non-justiciable political questions:

(1) determination of the lawfulness of and remedy for the Counties' occupancy has been committed to the President;

(2) determination of the Plaintiffs' claim entails a choice among contenders for the right to govern the area covered by the 1795 conveyance;

(3) determination of the Plaintiffs' claim entails the allocation of tribal property, which is committed to Congress;

(4) determination of these questions by a federal court entails the risk of multifarious pronouncements on the foregoing questions by the different branches of the federal government.

Our holding that the Oneidas have a federal common law cause of action and an action to enforce the 1793 Trade and Intercourse Act negates defendants' argument

that the exclusive remedy against illegal occupiers is committed to the President. *Accord, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977); *Schaghticoke v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976).

The Counties' next two propositions also must be rejected. They assert that the effect of the district court's decision is to transfer the sovereignty of over 100,000 acres of New York State land "to at least three tribal factions who are, and who have been for years, feuding over which is the proper government tribe." This, they assert, is an issue "on which the district court must defer 'to the political departments.'" *Id.*, quoting, *Baker v. Carr*, 369 U.S. 186, 215 (1962).

The district court found that the three plaintiffs were the direct descendants of the Oneida Indian Nation that inhabited the land in question in 1795. 434 F. Supp. at 532. Judge Port based this decision on expert testimony, implicit United States' verification stemming from annuity payments, and recognition by the Bureau of Indian Affairs. *Id.* at 532-33. Appellants have given us no reason to disturb this finding. Hence, there is no need to intrude on internal tribal governance; moreover, the appropriate allocation of damages amongst the plaintiffs is not a

question that is presently before us on appeal." Furthermore, as we observed in *Oneida Indian Nation v. New York*, "[t]o our knowledge no Indian land claim has ever been dismissed on non-justiciability grounds." 691 F.2d at 1081.

Finally, the Counties assert that our holding will have catastrophic ramifications. We rejected this argument in *Oneida Indian Nation v. New York*, in which we stated "we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed." *Id.* at 1083; *see generally id.*

(3) *Subsequent Federal Ratification.*

The Counties assert as a third defense to liability that the United States subsequently ratified the 1795 transaction in two federally approved treaties between the Oneidas and the State. The Treaty of June 1, 1798, describes the 1795 transaction as a "purchase." It also provides in relevant part:

> The said [Oneida] Indians do cede, release, and quitclaim to the people of the State of New York, forever, all the lands within their reservation, to the westward and southwestward of a line from the northeastern corner of the lot No. 54, *as the last purchase from them* running northerly to a button wood tree, . . . standing on the bank of the Oneida lake[.]

Treaty of 1798 (emphasis added). The "last purchase" referred to in this treaty, the parties agree, was the 1795

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[9] *See* 834 F. Supp. at 538 n.28 ("Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.").

transaction. The federally approved Treaty of June 4, 1802 also mentions lands "heretofore ceded . . . to the State of New York," ostensibly a reference to the 1795 purchase. In addition, both treaties refer to lots 54 and 59 which were part of the 1795 transaction.

We agree with the district court which cited *United States v. Santa Fe Pacific* in its holding that the reference in these treaties were not a "plain and unambiguous" ratification of the 1795 transaction. In *United States v. Santa Fe Pacific*, the Supreme Court refused to find that an ambiguous congressional pronouncement had acted to extinguish Indian land title. In so doing, the Court stated that " '[u]nquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' " 314 U.S. at 345, quoting *Cramer v. United States*, 261 U.S. 219, 227 (1923). Extinguishment of the Indians' title could not be "lightly implied" because "[c]ertainly, it would take plain and unambiguous action to deprive the Walapais [Indian tribe] of the benefits of that policy." *Id.* at 346, 354.

In arguing that the "plain and unambiguous" standard is inapplicable, the Counties attempt to distinguish the claimed ratification herein from the extinguishment of Indian title involved in *United States v. Santa Fe Pacific*. The distinction, however, is a meaningless one. Ratification also would serve to extinguish the Oneidas' title. We find the Counties' argument wanting for a second reason. Even under the standard propounded by the Counties it cannot be said that isolated references to land boundaries in the 1798 or 1802 treaties, which are little more than "metes and bounds" descriptions, are sufficient to constitute ratification of the 1795 transaction. Moreover, neither treaty makes any reference to the validity of the

underlying 1795 "purchase." There is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale.

III.

DAMAGES

After a separate trial on the issue of damages, Judge Port on October 5, 1981 awarded the Oneidas $9,000 plus interest against Madison County, and $7,634 plus interest against Oneida County for their unlawful use and occupation of the Oneidas' land for the years 1968 and 1969.[17] Judge Port arrived at these amounts by calculating the fair rental value of the land as unimproved for the years 1968 and 1969. Against these amounts he allowed the Counties a set-off for improvements because they occupied the land in good faith, and without knowledge of the unlawfulness of their continued occupation.

The appellants raise three issues regarding Judge Port's decision. The first is whether the Counties as allegedly good faith occupiers of the Oneidas' land can be held liable in damages. The second issue concerns the district court's ruling that the Counties could set-off against the damages assessed the amount of improvements they made on the land. And the third question is whether the law of eminent domain is relevant to the calculation of damages.

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17 As we noted earlier, see supra note 6, the district court found a violation of the 1793 Trade and Intercourse Act, but appeared to resort to the common law in formulating a damage remedy. We understand the district court to have examined the common law only to assist it in formulating a necessary damage remedy.

A. *Availability of a Damage Remedy.*

The Counties claim first that they did not violate the 1793 Trade and Intercourse Act, and second that if they did, the Act explicitly provides the exclusive remedies for its violation. They note that it was the state that violated the 1793 Act in 1795 and not the Counties,[18] which were subsequent occupiers of the land.[19] Even bad faith occupation would not violate the Act, the Counties assert, because section 8 regulates the disposition, not the occupation of Indian land. The Counties also contend that, in any event, they are good faith occupiers, and that the 1793 Act was not intended to assess damages against those holding land in good faith.

The Counties, however, do not question Judge Port's holding that the 1795 transfer of Indian land was void.[20] In effect the Counties have asked us to find that their good faith occupation of Oneida land can act as a subsequent validation of the 1795 transaction. To accept the Counties' argument, however, would render the Trade and Intercourse Acts wholly ineffective.[21]

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18 Oneida County was established in 1798 and Madison County in 1806. J. Lansing, *Manual for the Use of the Legislature of the State of New York* 310 (1938 ed.).

19 The district court was not able to ascertain when the Counties began their occupation of the Oneidas land, determining only that it was sometime in the 1800's.

20 Moreover, Judge Port's determination was amply supported. See 434 F. Supp. at 537-40

21 When Congress intended a provision in the same statute to contain an intent or good faith element it simply did so expressly. See § 6, 1 Stat. at 330 ("every person, who shall purchase a horse, knowing him to be brought out of Indian territory, by any person or persons not licensed, as above, to purchase the same shall forfeit the value of such horse.").

As we previously stated, the Oneidas are entitled to enforce the Nonintercourse Act's voiding of the 1795 purchase. This is what the Oneidas' lawsuit seeks to do. Their suit closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession. *See New York v. White*, 528 F.2d 336, 338 (2d Cir. 1975); *see also Taylor v. Anderson*, 234 U.S. 74 (1914). The Oneidas' claim is based on their present right of possession, *see Oneida Indian Nation*, 414 U.S. at 666, and the Counties' liability is premised on their continued occupancy of Oneida land in violation of the Act. Under the common law the good or bad faith of the occupant is irrelevant to his liability. *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 80-81 (1823); *Miceli v. Riley*, 436 N.Y.S.2d 72, 74-75, 79 A.D.2d 165 (1981). The Counties' occupation, regardless of their good or bad faith, of Indian land obtained in a transaction that violated the 1793 Act renders them liable.

The Counties also contend, however, that if their possession does violate the Act, the only remedies for their violation are expressly set out in the statute. *See supra* note 10. It follows from our conclusion that the Oneidas have a private cause of action that Congress intended the concomitant damage remedy that flows with it to be available; it is a "customary legal incident" of the private action. *See Transamerica*, 444 U.S. at 19. The Counties' conclusory statement that the statute provides the exclusive remedies for its violation, without citation to any legislative history, ignores the Supreme Court's repeated admonitions: "The creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies." *California v. Sierra Club*, 451 U.S. at 295 n.6, citing *Transamerica*, 444 U.S. at 29 n.6 (White, J., dissenting); *Cort*

v. Ash, 422 U.S. at 82-83 n.14. Accordingly, we agree with Judge Port that the Counties are responsible for the continuing violation of the 1793 Act and are liable in damages for that violation.

B. *Improvements' Set-Off.*

Since the Counties assumed possession of the Oneidas' land they have erected or completed several improvements on the land. They asserted, and the district court held, that the Counties were entitled to a set-off of the value of these improvements against the Oneidas' fair rental value damages. The improvements on the 871.92 total acres were: 809 acres used as highways; the 47.22 acre Champlain Battleground Park; a 2.07 acre parcel used as a fire department radio tower and a 13.13 acre gravel bed. To arrive at the rental value less improvements the court simply calculated the fair rental value of the land as unimproved.

Neither party appears to question Judge Port's fair rental value method of calculating damages.[11] Thus, the only dispute is whether the district court could set-off the value of improvements against the fair rental value damages. The court applied the common law rule that a good-faith occupier of land is entitled to a set-off for improvements. *See Green v. Biddle*, 21 U.S. (8 Wheat.) at 59; *see also Miceli v. Riley*, 436 N.Y.S.2d at 74; *Berney v. Brodie*, 272 N.Y.S.2d 881, 26 A.D.2d 679 (1966); 42 C.J.S. Improvements § 7 at 432 (1944). The Oneidas argue first that the common law rule should not be applied because it would frustrate the purposes of the 1793 Act by rewarding trespassers and encouraging un-

[11] *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917); *New Orleans v. Gaines*, 82 U.S. (15 Wall.) 624 (1872).

lawful alienations and occupations. We disagree. Presumably, the common law rule is based on the premise that to require forfeiture by the good-faith occupier of the value of its improvements would work an injustice and provide little in the way of added deterrence. A contrary rule would not discourage good faith trespassers from their illegal occupation because it is based on a mistaken, though still wrongful, belief of ownership. We are not prepared to require the good faith non-active wrongdoer, here a political subdivision, to forego the value of improvements it made in the absence of any policy benefits. If good faith occupiers were not credited with the value of their improvements, this would lead to the anomalous result that they usually would suffer higher damages than bad faith occupiers because good-faith occupants are more likely to make improvements.

The Oneidas next question the district court's finding that the Counties held the land in good faith. We find this issue more troublesome. The burden of proving good faith, rests on the Counties. *See, e.g., United States v. Wilson*, 523 F. Supp. 874, 900-901 (N.D. Iowa 1981); *Deakyne v. Lewes Anglers, Inc.*, 205 F. Supp. 415 (D. Del. 1962); *Church of God Prophecy v. Ferris*, 244 N.Y.S.2d 279, 281, 19 A.D.2d 934 (1963). The record does not show, however, whether the district judge placed the burden of proof on the Counties or on the Oneidas. Judge Port's opinion merely states that "there is no evidence to connect the defendants, these two Counties, with [the State's] act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 . . . ." At trial, however, the Counties only profferred evidence that they had been acting in good faith since 1970. Inasmuch as the Counties had possession of the Oneidas' land since sometime in the

1800's, it is not enough that they established good faith since 1970. On the basis of the present record, however, we are not prepared to overturn Judge Port's determination that the Counties had acted in good faith. We leave clarification of the issue of good faith to the district court on remand.

C. *Computing Damages at 90% of the Fair Rental Value.*

The Oneidas' last argument is that the lower court erred in calculating at less than 100% of the fair rental value certain lands through which highways presently run. Judge Port stated in his opinion:

> That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent domain could be applied here and do justice to the parties.

Judge Port then analogized the Oneidas' claim to a request for "just compensation" for a road easement condemnation, and calculated the fair rental of 90% of the value of the property. We cannot agree that such a discount is appropriate. It treats the Counties' occupation as if it were a lawfully obtained easement. We see no reason why there should be any diminution of the damages even if the uses were for a public purpose. Accordingly, on remand the district court should calculate damages without any discount.

III.

DISCUSSION

The Counties filed third-party complaints against the State seeking indemnification of any damages assessed against them for their possession of the Oneidas' land. The State moved to dismiss the complaints, and the Counties cross-moved for summary judgment. Judge Port granted the Counties' motion over the State's objections that the court lacked subject matter jurisdiction, that the complaint failed to state a cause of action, and that the State's eleventh amendment immunity to suit barred the action.

A. *Subject Matter Jurisdiction*

The State maintains that the district court erred in holding that it had ancillary jurisdiction over the indemnity action, contending that the indemnity suit does not arise out of the same core of operative facts as the Oneidas' claim against the Counties. Any indemnity liability, the State argues, would stem from the State's disposition of the land to the Counties, and not from its acquisition of the land in violation of the Trade and Intercourse Act. We disagree. In order to establish their right to indemnity the Counties must show that they are compelled to pay monetary damages as a result of the State's wrongful conduct—here, New York's violation of the 1793 Act. *See Great American Ins. Co. v. United States*, 575 F.2d 1031, 1035 (2d Cir. 1978); *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 465 F. Supp. 790 (S.D.N.Y. 1978); *Tajt v. Shaffer Trucking, Inc.*, 383 N.Y.S.2d 744, 52 A.D.2d 255 (1976). The Counties' indemnity claim, therefore, is based largely on

the same facts that established the Counties' liability. The Oneidas alleged and proved that the State had violated the 1793 Trade and Intercourse Act. Plaintiffs established, moreover, that the Counties were wrongfully occupying this land that had devolved from the State to the Counties. These same facts also establish the legal and equitable basis for the Counties' indemnity action. *See supra* section (II) (A). When the action for indemnification arises out of the same core of facts, the court's jurisdiction is "ancillary to its jurisdiction over the main action," *United States v. Furr & Co.*, 342 F.2d 383, 384 n.1 (2d Cir. 1965), and no independent basis for jurisdiction is necessary. *See* Fed. R. Civ. P. 14(a); *Agrashell, Inc. v. Bernard Sirotta Co.* 344 F.2d 583, 585 (2d Cir. 1965); *Dery v. Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); *Ayer v. General Dynamics Corp.*, 82 F.R.D. 115, 121 (S.D.N.Y. 1979); 3 J. Moore, Moore's Federal Practice § 14.26, at 14-108 & n.6 (1982).

B. *Failure to State a Cause of Action.*

We find no merit in the State's assertion that there is no cause of action for indemnity. "It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity.' Restatement, Restitution, § 76." *McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643, 646 (1980). Therefore, when "payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law." *Brown v. Rosenbaum*, 287 N.Y. 310, 318-19, 41 N.E.2d 77 (1942); *see also Dunn v. Uvalde*

Asphalt Paving Co., 175 N.Y. 214, 217-18, 67 N.E. 439 (1903); *Oceanic S.N. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 465-68, 31 N.E. 987 (1892); *City of Brooklyn v. Brooklyn City R.R. Co.*, 47 N.Y. 475, 486-87 (1872); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130, 147 (1932); Meriam & Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. Rev. 845 (1950).

C. *Eleventh Amendment Immunity.*

The State argues that the eleventh amendment is a bar to the Counties' claim against it. The amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

We agree with the district court that the eleventh amendment is not a bar to action against the State of New York. The State's acquisition of the Oneidas' land was in subordination to the power of Congress to legislate regarding Indian lands, pursuant to Article I, Section 8 of the Constitution.[23] The 1790 and 1793 Acts of Congress placed New York on notice that Congress had exercised its power to regulate commerce with the Indians.[24] Thus,

23 "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Pardon*, 377 U.S. at 192.

24 Section 8 of the 1793 Act prohibited purchases of Indian lands not negotiated "under the authority of the United States." *See supra* note

anything New York thereafter did with respect to Indian lands carried with it a waiver of the State's eleventh amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Employees v. Missouri Public Health & Welfare Dept.*, 411 U.S. 279, 283-84 (1973).[25]

In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the state of Alabama owned and operated a railroad in interstate commerce. Alabama had commenced its railroad operation twenty years after the enactment of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). This Act permitted a railroad employee to sue his or her employer for personal injuries sustained in the course of employment. The Court found that Congress had conditioned operation of a railroad on acceptance of potential FELA liability and any damage suits arising therefrom; by starting the railroad after the FELA had been enacted, Alabama had constructively consented to a waiver of its immunity. 377 U.S. at 192; *see also County of Monroe v. State of Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983). The importance of the chronology in *Parden* became readily apparent after the Supreme Court's subsequent decisions in *Edelman* and *Employees*. Unlike *Parden*, "[i]n neither of those cases did the state have sufficient notice that it would be liable for damages if it participated in the

7. Similarly, section 4 of the 1790 Act stated "[t]hat no sale of lands made by Indians . . . shall be valid to any person or persons, or to any state . . . ."

25 The Supreme Court has not stated the necessity of proving state waiver of immunity in the fourteenth amendment context. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. at 456. By ratifying the fourteenth amendment after the eleventh amendment, the states can be said to have waived their immunity in all cases in which Congress exercises its enforcement power under section 5 of the fourteenth amendment.

federal programs." *County of Monroe*, 678 F.2d at 1134. In *Employees*, Missouri had been operating hospitals long before the 1966 amendment extended the coverage of the FELA to state employees. In *Edelman*, similarly, Illinois was faced with a federal statute that appeared to impose only the sanction of future funding curtailment, and not a damage suit for benefits wrongfully withheld. Neither Illinois nor Missouri thus had "sufficient notice that it would be liable for damages if it participated in the federal programs." *Id.* As a result, neither state had a "real option to discontinue its participation in the activities subject to federal regulation and forego the accompanying benefits." *Ibid.* The choice between terminating "vital public services" and waiving eleventh amendment immunity was "no true choice at all." *Employees*, 411 U.S. at 296 (Marshall, *J.*, concurring).

The instant case is analogous to *Parden*. The 1793 Act was enacted two years prior to the state's purchase of Oneida land. Thus, the State had adequate notice that it was subject to the statute's strictures. *See generally supra*. As the district court noted, on several occasions President Washington and Secretary Knox urged New York to comply with the 1793 Act. *See* 434 F. Supp. at 534-35. The state chose to ignore their admonitions. The State's proprietary purchase of Indian land thus was an act wholly outside "the sphere that is exclusively its own and enter[ed the state] into activities subject to congressional regulation . . . ." *Parden*, 377 U.S. at 196. The State's act, "with its 'eyes wide open,' " *County of Monroe*, 678 F.2d at 1134, quoting *Edelman*, 415 U.S. at 693 (Marshall, *J.*, dissenting), "subjects itself to that regulation as fully as if it were a private person or corporation." *Parden*, 377 U.S. at 196. Therefore, we agree with the district court's determination that New York impliedly

consented to a waiver of its eleventh amendment immunity.

* * * * *

We affirm the judgment of the district court which held the Counties liable for illegal occupation of the Oneida land, and its judgment that the State of New York must indemnify the Counties for any damages assessed against them.

We remand for further proceedings to determine the good faith claims of the Counties as they bear on any set-off for improvements made on the property, and for recomputation of damages.

MESKILL, *Circuit Judge*, dissenting:

I respectfully dissent.

The implications of the majority's decision are far reaching and I believe that the decision is wrong. The present dispute involves 871.92 acres of land and a judgment for $16,694, plus interest, for two years' use thereof, not an unusually significant amount in and of itself. But the court does not specify any limiting principles in this area. I see nothing in the majority's opinion which, when coupled with our decision in *Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070 (2d Cir. 1982), would prevent the Oneida or any other tribe from suing for the full value of all land taken from them at any time during our nation's history in contravention of federal law—to say nothing of the possibility of bringing an action for ejectment. Courts should be reluctant to invite such potentially staggering claims on the skimpy authority relied on today by the majority.

This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting.[1] Today's decision is likely to interfere with rather than advance the federal government's policies towards Indians.

To decide that Indian land claims should be resolved by judicial fiat is not only unwise, it is also unnecessary. The Indian tribes have remedies available without resort to the federal courts. Congress has established administrative procedures to resolve Indian land claims and the federal government can sue in federal court to enforce Indian land rights.[2] If the existing federal administrative mechanism is ineffective, the Indians' proper remedy is not in the federal courts, but rather in Congress.

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1 The Indian tribes are considered sovereign "which, by government structure, culture, and source of sovereignty, are in many ways foreign to the constitutional institutions of the Federal and State Governments." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 71 (1978); *see also Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-40 (1982); *United States* v. *Wheeler*, 435 U.S. 313, 322-23 (1978). Relations with Indian tribes can thus be analogized to relations with foreign nations. The Supreme Court has shown great reluctance to interfere with or take actions that might embarrass the federal political branches' conduct of foreign affairs, *see, e.g.*, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion); *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 431-33 (1964); *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, *C.J.*).

2 *See United States* v. *Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Cramer* v. *United States*, 261 U.S. 219 (1923).

I

The majority holds today that the Oneida may maintain a direct action to recover damages for wrongful occupancy. Despite the majority's claim to the contrary, this is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law.

From the outset of the Union, Indians were considered wards of the United States; the federal government assumed the role of their guardian. *See, e.g.*, *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, *C.J.*) ("[T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . ."); *cf. United States* v. *Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.").

From the special guardianship relation between the United States and the Indian tribes, it can be inferred that the Indians should be subject to liabilities under federal law only when Congress sets up a statutory scheme. This has long been settled law. *See, e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (reaffirming that tribal sovereign immunity is coex-

tensive with that of the United States; "[t]hese Indian Nations are exempt from suit without Congressional authorization."). Similarly, it follows that their federal rights should also be based on specific congressional acts. Far from a leap of logic, this is equally settled law:

> The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians. *Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States* specially *conferring upon them the civil rights of suitors. In all the cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit.* The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fulfillment of their obligations or the discharge of their duties.

Jaeger v. *United States*, 27 Ct. Cl. 278, 284-85 (1892) (emphasis supplied).[3]

Special statutes giving Indians the rights of suitors were necessary because it was inconceivable to lawmakers and judges in the era of early American common law that Indian tribes would resort to courts of law to enforce their legal rights. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 17 (Marshall, *C.J.*) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a

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3 *See Kawananakoa* v. *Polyblank*, 205 U.S. 349 (1907) (federal circuit court had no jurisdiction in a case involving a non-citizen Indian whose complaint did not raise a federal question).

redress of wrong, had perhaps never entered the mind of an Indian or of his tribe."). Thus, viewed from a common law perspective, it is apparent that there never existed a federal common law private cause of action for damages.

Assuming *arguendo* that a federal common law cause of action in favor of the Indians existed, it was preempted by the Trade and Intercourse Acts.

When Congress addresses directly and comprehensively a question previously governed by federal or state common law, that common law is preempted. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). While the majority does not dispute this, it finds that Congress did not intend to preempt the field because the Trade and Intercourse Acts were not comprehensive statutes. This explanation ignores existing Supreme Court case law on preemption and improperly addresses the issue of congressional intent.

The majority points out that the Acts "did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment."[4] But Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Supreme Court held a Pennsylvania alien registration statute invalid under the Supremacy Clause partly because the state statute interfered with the federal scheme of registration, even though the state and federal statutes were not explicitly contradictory and there was no express congressional intent to override state legislation. The Court noted that "[e]xperience has shown that international controversies

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4 It is not surprising that the Act did not expressly refer to an "existing" federal common law right. Of all the cases cited by the majority to indicate the existence of such a cause of action, *not one* was decided before 1793.

of the greatest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." 312 U.S. at 64. The Court thus reasoned that state law which potentially conflicted with federal law in this sensitive area had to fall because the federal government was the agent of foreign policy in our country and, as the agent, it had determined that a particular scheme of registration was necessary in order to avoid friction with other nations.

The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to reassure Indians who had grown "restive." This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statutes at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981). *See Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

The majority also tries to determine whether the early congressional scheme was comprehensive from a late twentieth century perspective. But, we must remember that it is the intent of the 2nd Congress which we search for here, not the perceived views of a Congress elected

many years later. It is true that the 1790 and 1793 Acts were not comprehensive by today's standards, but they did proscribe certain acts and provide civil and criminal sanctions. Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated.

The majority's reliance on the language in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941), is inappropriate, inasmuch as that case involved a mid-19th century statute which allegedly abolished the Indians' aboriginal rights. There, the Supreme Court was talking about the extinguishment of undisputed title to land, not the preemption of a questionable right of a ward to a private cause of action.

II

The majority states that the Nonintercourse Acts were passed to protect Indian tribes and determines, on the basis of the language cited in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-75 (1982), that when a statute is enacted in order to benefit a special class of beneficiaries, the judiciary will normally recognize a remedy for class members if the statute was passed prior to *Cort* v. *Ash*, 422 U.S. 66 (1975). Therefore, reasons the majority, when Congress passed the aforementioned Acts it must have intended that the beneficiaries would be able to enforce their rights by a private action. While superficially appealing, this argument lacks the support of either precedent or legislative history. *Merrill Lynch* does not address the question whether a private cause of action should be implied where Congress has explicitly granted the federal government the power

to sue to protect the rights of the particular group benefited by the statute.

The majority is correct that the Acts were passed in order to protect Indian tribes. However, it takes a great leap of logic to suppose that the Congresses that passed the Acts intended the Indian tribes to have a private cause of action for violations of these Acts. It is difficult to believe that at that time Congress would have left it to the courts to imply such a significant and far reaching remedy, particularly when we remember that the Acts were passed in order to avoid war with the Indian tribes. Obviously Congress never intended the remedy to be available.

I believe that the lower courts that have assumed a private cause of action for a violation of the Acts, *see, e.g., Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 805 & n.3 (D.R.I. 1976), are in error. They use neither legislative history nor valid precedent[5] to support their position.

Similarly, the need for private enforcement because of poor government performance in this area should not affect the outcome here. The government's failure to enforce Indian rights vigorously provides a strong argument for the need for private enforcement. That argument should be made to Congress, however. We should not perform a legislative function. Furthermore, when

5 These cases all rest upon decisions that recognized a private right of action to Indians when the United States had the power to sue on the same cause of action and to seek the same relief. They do not support the proposition that if the government has a statutorily based power to pursue a remedy, the Indians may bring their own action for a different remedy that does not arise out of the same statute.

construing a statute passed in the late 18th century, we should not consider events which transpired, or failed to transpire, in the subsequent 200 years in order to shed light on congressional intent.

The majority states that even under traditional *Cort* v. *Ash*, 422 U.S. 66 (1975), criteria, a private cause of action may be maintained. I believe the opposite conclusion to be the case here.

This case does not satisfy the second prong of the *Cort* test, namely, whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78. I believe that congressional silence on this question indicates a desire not to include a private cause of action as a remedy.

The majority states that Congress intended in the 1793 Act to provide "maximum protection" to Indian land. Assuming this to be true, Congress probably never believed private action necessary in order to accomplish maximum protection. The Act provided for criminal sanctions for violations and included a provision authorizing the executive branch to remove violators from Indian land.[6] These sanctions if utilized would appear to be full and adequate remedies for the conduct that Congress wished to proscribe. Furthermore, it would have been an easy matter for Congress to provide for a private cause of action in favor of Indian tribes or to expressly continue an existing common law remedy if one existed. The failure to do so indicates to me that Congress either did not wish to enact such a remedy or that it never considered the issue. Either explanation would produce the same result—no private cause of action was intended.

6 *See* Majority op. n.12.

The court's reference to *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979), is inappropriate. There, the Court dealt with a statute, section 215 of the Investment Advisers Act of 1940, that only declared certain contracts void. Neither sanctions, nor remedies, nor any mechanism for voiding contracts were explicitly provided. By contrast, the 1790 Act, *as amended* by the Act of 1793, *did* explicitly provide sanctions and an enforcement mechanism. Indeed, these later enforcement provisions were included *because* the 1790 Act lacked them.

By contrast, the instant dispute is analogous to the claim in *Transamerica* for a private cause of action under section 206 of the Investment Advisers Act. Congress expressly provided judicial and administrative means to enforce section 206 rights, including criminal penalties and authorization to the SEC to enjoin compliance with the Act. 444 U.S. at 20. The Court stated that "[i]n view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* (citation omitted). As the Supreme Court noted, "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Id.* at 19-20 (citation omitted).

The same reasoning is applicable to the present case. Because Congress explicitly provided for remedies and sanctions in the 1793 Act, it is "highly improbable" that it forgot to include a private cause of action. This is particularly true in view of the importance that Congress

and the President placed on the matter of Indian affairs in the 1790s.

The majority's characterization of the 1822 Act is not convincing. The provision in the 1822 Act referring to Indians as parties does not only make sense, as the majority claims, "if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants." This provision also applies to a suit in which the government seeks to enforce Indians' rights on their behalf. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In such a case, the Indians in question would be the real parties in interest. Congress could have been indicating that in this type of action the burden of proof would not be on the government as plaintiff-guardian.

In sum, I believe there is no basis upon which the majority can imply a private cause of action by Indians to recover damages for wrongful possession. To hold otherwise is a novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.

I would reverse and remand with directions to dismiss the complaint.

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Appendix E—Constitutional and Statutory Provisions Involved.

U. S. Constitution, Article I, Section 8, Subd.3.

Regulation of commerce—3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U. S. Constitution, Article III, Section 2, Subd.1.

SECTION 2.

Jurisdiction of Federal courts.—1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U. S. Constitution, Tenth Amendment.

ARTICLE X.

Powers not delegated, reserved to States and people respectively.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(The eleventh amendment, which follows, was proposed to the legislatures of the several states by the third Congress on March 4, 1794, and was declared in force January 8, 1798.)

U. S. Constitution, Eleventh Amendment.

ARTICLE XI.

Judicial power of United States not to extend to suits against a State.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Trade and Intercourse Act of 1793.

STATUTE II.

March 1, 1793.

[Repealed.] May 19, 1796, ch. 30.

Trade with the Indian tribes to be under license.

1793, ch. 13.

CHAP. XIX.—*An Act to regulate Trade and Intercourse with the Indian Tribes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, to ensure the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Power of the person granting such licenses.

SEC. 2. *And be it further enacted*, That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

Forfeiture on attempting to trade without a license.

SEC. 3. *And be it further enacted*, That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: *Provided*, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Punishment on committing crimes against friendly Indians.

SEC. 4. *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Forfeiture in cases of settlement on their lands.

SEC. 5. *And be it further enacted*, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

Horses not to be purchased of Indians without license.

SEC. 6. *And be it further enacted*, That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: *Provided also*, That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Forfeiture by the persons granting license trading with Indians.

SEC. 7. *And be it further enacted*, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Purchases of their lands invalid unless made pursuant to the Constitution.

SEC. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with

Proviso.

the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

President to furnish friendly Indian tribes, with domestic animals, &c.

SEC. 9. *And be it further enacted*, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided*, That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

to what amount in value.

Before what courts crimes against this act may be tried.

SEC. 10. *And be it further enacted*, That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each districts of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

President of U. S. and territorial governors how to proceed on proof made of crimes against this act.

SEC. 11. *And be it further enacted*, That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Disposition of fines and forfeitures under this act.

SEC. 12. *And be it further enacted*, That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Construction of this act defined.

SEC. 13. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and

Acts within the purview of this act repealed.

Limitation of this act.

SEC. 14. *And be it further enacted*, That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

SEC. 15. *And be it further enacted*, That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

APPROVED, March 1, 1793.

SUPPLEMENTAL BRIEF

OFFICE - SUPREME COURT, U.S.
FILED
FEB 10 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1240

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and the County of Oneida, New York and The County of Madison, New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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Dated: February 8, 1984

BEST AVAILABLE COPY

No. 83-1240

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OCTOBER TERM, 1983.

THE STATE OF NEW YORK,

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THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF.

The petitioner, the State of New York, respectfully submits this brief to supplement its petition for a writ of certiorari filed with this Court on January 26, 1984. The reason for the filing of this supplemental brief is to call attention to this Court's recent decision in *Pennhurst State School & Hosp. v. Halderman*, ____ US ____ (dec. Jan. 23, 1984), 52 US Law Week 4155, which we believe has direct bearing upon the jurisdictional issues raised in this case and provides an additional reason for granting the writ.

In *Pennhurst*, this Court held that the Eleventh Amendment bar to suits against non-consenting states was applicable "to state-law claims brought into federal court under pendent jurisdiction" (____ US at p ____, 52 US Law Week at p 4164). Although the holding in *Pennhurst* related specifically to "pendent" jurisdiction rather than to "ancillary" jurisdiction, the Court's analysis of the jurisdictional issue is equally relevant to either and thus directly relevant to the third question presented in our petition and, indeed, controlling so that review is warranted.

As was stated by the Court in conclusion, ____ US at p ____, 52 US Law Week at p 4163:

> "In sum, contrary to the view implicit in decisions such as *Greene*[*], *supra*, neither pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." (Emphasis supplied.)

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*Greene v. *Louisville & Interurban R. Co.*, 244 US 499 (1917).

We also suggest that the teachings of *Pennhurst* reinforce the need for this Court to review the other immunity issues presented in our petition.

CONCLUSION.

For the reasons stated here and in the State's petition in chief, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
February 8, 1984

Respectfully submitted,

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Attorney for Petitioner

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RESPONDENT'S

BRIEF

No. 83-1065 (5)

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IN THE

Supreme Court of the United States

October Term, 1983

COUNTY OF ONEIDA,
COUNTY OF MADISON,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
and STATE OF NEW YORK,

Respondents,

No. 83-1240 (4)

STATE OF NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
COUNTY OF ONEIDA,
and COUNTY OF MADISON,

Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF ONEIDA OF THE THAMES BAND COUNCIL IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondents have a cause of action for damages under the federal common law or the Trade and Intercourse Act for the wrongful occupation of their land.

2. Whether this action is barred by defenses based on state law or by 28 U.S.C. § 2145.

3. Whether the 1795 transfer was subsequently ratified by the United States.

4. Whether respondents' claims are justiciable.

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-1065

COUNTY OF ONEIDA,
COUNTY OF MADISON,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
and STATE OF NEW YORK,

Respondents,

No. 83-1240

STATE OF NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
COUNTY OF ONEIDA, and COUNTY OF MADISON,

Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ONEIDA OF THE THAMES BAND COUNCIL IN OPPOSITION

PARTIES

The County of Oneida, New York, and the County of Madison, New York, have petitioned this Court for a writ of certiorari in case number 83-1065 to review the Court of Appeals' holding of liability and damages for the wrongful

occupation of respondents' land. The State of New York has petitioned for a writ of certiorari in case number 83-1240 to review the holding of liability and damages and the holding that the State must indemnify the Counties. The Oneida of the Thames Band Council is a respondent in both cases. This brief in opposition responds to both petitions.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 719 F.2d 525 (2d Cir. 1983). The other opinions are correctly listed in petitioners' briefs.

JURISDICTION

This Court's jurisdiction is correctly stated in petitioners' briefs.

CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

The relevant constitutional, statutory and treaty provisions are set out in the briefs of petitioners and appendices.

STATEMENT OF THE CASE

This action seeks to redress an historic and continuing wrong, the taking in 1795 of land belonging to the Oneida Nation in violation of federal law. Respondents, as direct descendants of the Oneida Nation, continue to suffer the ill-effects of the loss of land which resulted from the conveyance challenged in this action.

The decision holding petitioners liable for the wrongful

occupation and use of respondents' land is based on well-established principles of federal law. It is fully consistent with decisions of other federal courts and this Court. Moreover, the decision below does not finally resolve all of the issues raised in this case. For these and other reasons, this Court should decline to review this case.

As noted by the District Court, respondents have sought to have their rights in the subject land determined in the least disruptive fashion to the record owners. Decision on the Issue of Damages, October 5, 1981, Supplemental Appendix of Counties at 69a. Respondents have sought over a period of years to obtain a remedy by other means. *See* 434 F.Supp. 527, 531. When these efforts proved futile, this action was filed in order to establish the viability of the claim and to build a foundation for a possible negotiated settlement and legislative solution. Thus, this action is limited to damages for two years against two counties which occupy a small part of the claim area. No private parties were named as defendants nor was any other form of relief sought.

On November 11, 1971, the District Court dismissed the action on jurisdictional grounds and the Court of Appeals affirmed. 454 F.2d 916 (2d Cir. 1972). This Court reversed and remanded, holding that federal question jurisdiction in this case is based "on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal land, wholly apart from the application of state law principles . . . ." 414 U.S. 661, 677 (1974).

Upon remand, the District Court held that respondents had proven a prima facie case of violation of the Trade and Intercourse Act, that the transfer was void, and, as a

result, respondents still own the subject land. 434 F.Supp. at 540, 548. The Counties were held liable for wrongful occupation as successors to the State. 434 F.Supp. at 548.

The District Court did not reach respondents' claim that New York's acquistion of Onedia land is void for violation of the federal treaties guaranteeing their rights to the land.

The essence of the District Court decision is that the State of New York knowingly and directly violated the Trade and Intercourse Act by acquiring Oneida land without the approval or ratification of the United States. Thus, the wrong which the District Court's decision vindicates is that the respondents have been deprived of their land in violation of federal law.

The Court of Appeals affirmed and remanded for further proceedings on three aspects of the damages issue. 719 F.2d at 530-537. The judgment against the State of New York was also affirmed. 791 F.2d at 542-544.

REASONS FOR DENYING THE WRIT

I. This Case is Not Ripe for Review Because Substantial Issues Remain for Resolution by the Courts Below

The decision below did not finally and conclusively resolve all the claims and issues raised in this case. The Court of Appeals remanded the issue of good faith occupation for "clarification" since it was unclear whether the District Court placed the burden of proof on the Counties or on the Oneidas. 719 F.2d at 542. The issue of whether the Counties can set off the value of improvements against the damages cannot be resolved without further evidentiary proceedings, since the Counties submitted only evidence of good faith since 1970 and, the Court of Appeals held, "[i]nasmuch as the Counties

had possession of the Oneidas' land since sometime in the 1800's, it is not enough that they establish good faith since 1970." 719 F.2d at 542. The Court of Appeals also remanded for a recalculation of damages at 100% of the fair rental value of the land. 719 F.2d at 542. This case is not appropriate for review until these issues are resolved.

Also, the rights of respondents to share in the award have not been determined by the District Court. 434 F.Supp at 538 n. 20. It would likewise be premature to review this case until these issues are resolved by the lower courts.

At this stage, a decision by this Court in favor of the petitioners would not finally dispose of respondents' claim to the subject land. Even if, for example, this Court were to grant the petition and conclude that there is no common law or statutory right of action, there would remain to be resolved respondents' claim that the 1795 transfer is void for violation of the federal treaties. 434 F.Supp. at 537, n. 19. Respondents claimed, as an alternative ground of relief, that the 1795 transfer is void because it violated respondents' rights under the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794. The District Court has not considered this claim. Thus, it is quite possible that a decision by this Court would not finally resolve respondents' rights in the subject land.

II. The Importance of This Case is Limited Primarily to the Parties and Land Area Involved in this Case

To clarify what is at stake here, it is important to note what is *not* involved in this case. This is not an action to recover land from record owners. No private landowners, whether individuals or corporations, have been sued here. The Counties' and State's exaggerated predictions about

widespread disruption and catastrophe arising from this action are based simply on speculation, not on facts in the record. Petitioners' conjecture about what respondents might do in the future should not be the basis for granting a petition for writ of certiorari.

None of the dire consequences of which the Counties and State complain have occurred. No landowner has been ejected. The controversy here is strictly limited to the respondents, the Counties and the State and the question of a damages remedy for wrongful occupation.

In none of the recent or pending cases has ejectment been ordered as a remedy for a violation of the Trade and Intercourse Act or the federal common law. That issue is not presented by this case. If and when ejectment actions are brought and decided by the lower courts, this Court will likely have an opportunity to review these actions. The concerns of the Counties and the State are more appropriately raised in a case which does in fact cause disruption. By contrast, this case, which seeks damages against only two governmental defendants for two years, is not a suitable vehicle by which to review these issues.

The Counties misrepresent many crucial facts. They assert that this action vindicates the claims of "the purported descendants of an Indian tribe which admittedly sold the land nearly two centuries ago" and which "acquiesced in" the good-faith occupation of the record owners. Counties' Petition at 9. In fact, the District Court found, on the basis of uncontradicted evidence, that respondents are the direct descendants of the Oneida Nation.

Moreover, it is a distortion of the record to characterize the 1795 transaction as a "sale." As the District Court found, the circumstances surrounding the Oneidas' purported consent to the transaction were fraught with irregularities.[1] 434 F.Supp. at 535.

Further, the Counties incorrectly state that the Oneidas "slept on whatever rights they may have had for 175 years." Counties' Petition at 15. The District Court specifically found to the contrary: "Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land." 434 F.Supp at 536. The protests continued up until the time this suit was filed. 719 F.2d at 529.

The number of Indian land claims which would be materially affected by the disposition of this case is not nearly so great as the Counties suggest. Again, the Counties offer only speculation about cases which may be filed at some unspecified date. The Counties fail to show how this case is relevant to or would affect the other Indian claims that have been filed or could be filed. Nor do the Counties distinguish among the myriad factual situations and legal theories which may determine the outcome of those cases.[2]

The potential for disruption of private real estate ownership is greatly exaggerated by the Counties and the

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[1] These included the fact that the State knew it was violating the Trade and Intercourse Act by negotiating with the Oneidas; the fact that the instrument was signed at a place where the Oneidas had never before made a treaty; and the fact that none of the individuals who signed was an Oneida chief and none was properly authorized to sign. 434 F.Supp. at 534-535.

[2] *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982) rests on an entirely different legal theory and facts, namely, that the alienation of Oneida land in 1785 and 1788 is void for violation of the Articles of Confederation and federal treaties.

State. The Houdenosaunee has not laid claim to the entire Northeast. Moreover, of the major eastern Indian land claims, four have already been settled by legislation.[3] Since voluntary settlement is a desirable way to resolve these claims, it is reasonable to anticipate progress toward settling the other claims in the same manner. In addition, many of the recent Indian land claims have been unsuccessful.[4] In any event, the possibility that the issues in this case might arise in other Indian land claims is not a sufficient reason for this Court to review this case. The lower federal courts are resolving these cases by uniformly applying settled principles. There is no present need for this Court to review the disposition of these cases.

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[3]*See* Maine Indian Claims Settlement Act *of* 1980, 25 U.S.C. § 1721-1735 (Passamaquoddy Tribe, Penobscot Nation and the Houlton Band of Maliseet Indians); Rhode Island Indian Claims Settlement Act *of* 1978, 25 U.S.C. § 1701-1716 (Narragansett Tribe *of* Indians); Florida Indian Land Claims Settlement Act *of* 1982, 25 U.S.C. § 1741-1749 (Miccosukee Tribe *of* Indians); Mashantucket Pequot Settlement Act *of* 1983, P.L. 98-134, October 18, 1983.

[4]*Eppa v. Andrus*, 611 F.2d 915 (1st Cir. 1979) (failure to establish tribal status); *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D. Mass. 1977), *aff'd* 592 F.2d 575 (1st Cir.), *cert. denied* 444 U.S. 866 (1979) (failure to establish tribal status); *James v. Watt*, 716 F.2d 71 (1st Cir. 1983) (lack of standing; Indian Commerce clause does not invalidate Indian land conveyance to the state); *Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D. Mass. 1982), *aff'd* 707 F.2d 23 (1st Cir. 1983) (dismissed on res judicata grounds); *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982) (tribe precluded from asserting land claim by Louisiana Land Claims Acts of 1805 and 1807).

III. The Decision Below is Consistent with Longstanding Principles of Federal Law

The Court of Appeals' decision is not novel. It correctly applied well-established principles of federal law which have been uniformly followed. No part of the decision conflicts or is inconsistent with the decisions of this Court, other circuit courts or district courts. This is not a case in which this Court's review is required to resolve a conflict in the law or to clarify relevant legal principles. There is no confusion among lower federal courts requiring this Court's attention.

This Court's 1974 decision in this case largely settled the central question for which review is requested: whether respondents have a cause of action to enforce federal restraints on alienation of their land as expressed in the Trade and Intercourse Act and the common law. In concluding that federal question jurisdiction existed, this Court held that respondents' cause of action arose under the Trade and Intercourse Act and certain federal treaties and that federal question jurisdiction "rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands. . . ." 414 U.S. at 667.

The Court of Appeals properly interpreted and relied on this Court's 1974 decision in finding a cause of action to enforce Indian land rights. 719 F.2d at 530. Petitioners have offered no reasons why this Court should reexamine the settled principles affirmed in its 1974 decision.

This case presents no important questions of federal law which should be decided by this Court. The question of whether a federal common law right of action is available was settled by this Court over 160 years ago. *Johnson v.*

M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). As this Court remarked some time later, *Johnson v. M'Intosh* stands for the proposition "[t]hat an action for ejectment could be maintained on an Indian right of occupancy and use, is not open to question." *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850).[5]

An unbroken line of authority in this Court recognizes a common law and statutory right of action to seek remedies for the taking of Indian land in violation of restraints on alienation.[6] The lower federal courts are in accord[7]

On the other hand, the question of whether the common law right of action is preempted by the Trade and Intercourse Act has not been decided by this Court, but there is no reason why it should be. The Court of Appeals' deci-

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[5]*See also*, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 523 ("The right to protection of tribal possession through actions of ejectment, trespass or other similar possessory suits was affirmed early in the nation's history.")

[6]In *Smith v. Stevens*, 77 U.S. 321 (1870), this Court affirmed a remedy of ejectment for the unlawful conveyance of Indian land. The land had been deeded to a non-Indian in violation of a statutory provision requiring secretarial approval of sales. In *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), this Court recognized a common law right of action for an accounting for all "rents, issues and profits" against trespassers on land to which Indians retained unextinguished title. *See also*, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) ("[T]he federal restrictions preventing Indians from selling or leasing allotted land without the consent of a government official do not prevent the Indian landowners, like other property owners, from maintaining suits appropriate to the protection of his rights.").

[7]*United States v. Allen*, 179 F.2d 13 (8th Cir. 1910) (Indians have "a clear right to maintain any suit necessary to set aside illegal conveyances of [their] property"); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976) (common law right of action available to hold railroad liable for trespass damages arising from wrongful use of Indian land under right-of-way agreements which violated the Trade and Intercourse Act).

sion, along with a recent decision of the District Court for the Northern District of New York,[8] are the only judicial opinions on this issue. This issue is not ripe for consideration by this Court; it is more appropriately reviewed after the lower federal courts have more thoroughly illuminated all aspects of the issue.

In any event, the Court of Appeals' decision in this regard is correct. The Trade and Intercourse Act is not the type of comprehensive legislation which federal courts, including this Court, have found to preempt common law remedies.[9]

For similar reasons, this Court should not review the question of whether a right of action can be implied under the Trade and Intercourse Act. Review now would be premature. Moreover, this issue is not of recurring importance in Indian land claims litigation because a common law right of action is available to redress violations of the Act. Also, the issue is of secondary importance because the validity of Indian land transfers does not depend solely on the Trade and Intercourse Act. Quite independently of the Act, it is established as a matter of common law that conveyances of Indian land without the approval of the United States are void. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. at 667-668. A decision by this Court on this issue would have very little effect on Indian land claims litigation.

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[8]*Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297, 1319-1321 (N.D. N.Y. 1983) (finding no preemption).

[9]*See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981) (Federal Water Pollution and Control Act and Marine Protection and Sanctuaries Act preempt common law nuisance remedies); *United States v. Kin-Buc, Inc.*, 532 F.Supp. 699 (D. N.J. 1982) (Clean Air Act preempts common law nuisance remedies).

The other issues raised by the Counties likewise do not warrant review. Judicial opinion is unanimous that state law delay-based defenses are inapplicable to actions brought by Indian tribes to remedy land rights violations.[10] This line of cases is based on sound principles; there is no reason for this Court to examine the issues.

The Court of Appeals' holding that 28 U.S.C. § 2145 can be used for guidance to determine whether respondents' claim is barred by any federal statute of limitations is also correct. It is in accord with other circuits which have considered the issue. *See, e.g., Captain Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465, 469-472 (9th Cir. 1975), *cert. denied* 243 U.S. 874 (1976). This Court's review is not warranted when there is no conflict among the circuits.

Similarly, there are no persuasive reasons to review the Court of Appeals' ruling of justiciability. The types of issues in this suit have consistently been held to be justiciable. As the Second Circuit has remarked: ". . . no Indian land claim has ever been dismissed on non-justiciability grounds." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1081 (2d Cir. 1982); *see also, Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649, 664 (D. Me.), *aff'd*,528 F.2d 370 (1st Cir. 1975).

[10]*See, e.g., Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983); *Cahuzon Band of Mission Indians v. City of Indio*, 694 F.2d 634 (9th Cir. 1982); *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083-1084 (2d Cir. 1982); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), *cert. denied*, 316 U.S. 694 (1942); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 808 (D. R.I. 1976).

The Court of Appeals' holding that the 1795 transaction has not been ratified should not be reviewed. This issue is of importance only to the parties to this suit. In any event, the court applied the proper standard and correctly analyzed the subsequent treaties. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941).

Finally, the issue of the State's Eleventh Amendment immunity from the Counties' indemnification claim should not be reviewed because the Court of Appeals' decision is fully consistent with this Court's decisions on the issue.

IV. The Decision Below Redresses in a Fair and Just Manner the Continuing Violation of Respondents' Rights

The Counties suggest that this action unfairly seeks to invalidate an arms-length sale of land on a mere technical violation of a federal statute. In fact, this action seeks redress for the dispossession of Oneida land at the hands of officials of the State of New York who acquired the land through overreaching and in direct and knowing violation of the Trade and Intercourse Act. *See* 719 F.2d at 528-529. The Court of Appeals' decision vindicates the longstanding policy of the United States of protecting Indian land, which can only be acquired by treaty with the United States. *See United States v. Sante Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941).

The Oneidas have been victimized by the violation of federal law which deprived them of their land. As the Court of Appeals remarked, between 1795 and 1846 "[s]ocial and economic forces, including poverty, famine, alcoholism, and pressures on the Oneidas to move West resulted in the alienation of virtually all of their remaining

New York acreage." 719 F.2d at 529. The injury to Oneida society and people caused by this wrong is severe. Respondents continued to suffer the consequences.

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 83-1240.

Supreme Court, U.S.
FILED
MAR 1 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE STATE OF NEW YORK,
PETITIONER,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; AND THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Respondents County of Oneida, New York, and County of Madison, New York, in Opposition to Petition for Writ of Certiorari by the State of New York.

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Questions Presented for Review.

1. Whether, assuming that an Indian tribe and the State of New York failed to comply with the Indian Trade and Intercourse Act of 1793 in making a conveyance of land in 1795, the present Indian respondents have a cause of action under federal substantive law against the present occupiers of that land, especially when neither respondents nor petitioners were parties to, or extant at the time of, the conveyance;

2. Whether the State waived its immunity to suit by participating in the 1795 conveyance;

3. Whether ancillary jurisdiction exists over a third-party complaint for indemnity based on New York law brought by present occupiers of the land against the State;

4. Whether present occupiers have a cause of action for indemnity under New York or federal law against the State.

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No. 83-1240.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE STATE OF NEW YORK,
PETITIONER,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A THE ONEIDA NATION OF NEW YORK, A/K/A THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; AND THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Respondents County of Oneida, New York, and County of Madison, New York, in Opposition to Petition for Writ of Certiorari by the State of New York.

Respondents the County of Madison, New York, and the County of Oneida, New York ("the Counties") respectfully request that this Court deny the petition for certiorari seeking review of the opinion of the Court of Appeals in this case insofar

as it seeks review of the issues raised by the Counties' third-party claim against the State of New York ("the State"). The State's petition is dated January 25, 1964, and was received by counsel for the Counties on January 30, 1964.

As amply described in the petitions for certiorari filed in No. 83-1065 by the Counties and in this action by the State, this case presents novel and important questions of federal law concerning almost two-century-old claims by groups of Indians against the present possessors and record titleholders of land in central New York. The Counties and the State are in total agreement that these questions concerning the plaintiff Indians' claims must be addressed by this Court, due both to the implications they hold for the present respondents and to those they hold for millions of landowners throughout much of the Eastern United States.

The State, however, goes further and asks that certiorari be granted as well with respect to the Counties' claims for indemnity against it. The lower courts upheld these claims, holding that the acts and omissions giving rise to the plaintiffs' claims and the Counties' liability were those of the State; that they had jurisdiction to hear the Counties' claims; and that New York had waived its Eleventh Amendment immunity under the principle established by *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964).

The Counties respectfully disagree with the State as to the need for this Court to review these latter aspects of this case. Unlike the law concerning the plaintiffs' basic liability claims, the law with respect to the Eleventh Amendment and ancillary jurisdiction issues is well established, and any questions as to New York law of indemnity are, of course, issues of state, not federal, law. In any event, these issues are secondary issues; the real and important issues raised by this case all have to do with the validity and assertability under federal law of the underlying liability claims of the plaintiffs.

Summary of Argument.

The Court of Appeals determined three issues with respect to the third-party claim by the Counties for indemnity; first, that the State had waived its Eleventh Amendment immunity; second, that ancillary jurisdiction existed for the third-party claim; and third, that the Counties were entitled to indemnity under New York law. The conclusions drawn by the Court of Appeals are in accordance with well-settled principles of federal and New York law, and it is neither necessary nor appropriate for this court to review those conclusions.

Reasons Why the Writ Should be Denied.

I. The Conclusion of the Court Below that the State Waived Its Eleventh Amendment Immunity Was Based upon Well-Established Principles of Federal Law and Does Not Warrant Review by This Court.

The court below held that the State of New York, by engaging in a proprietary purchase of Indian land subject to the Trade and Intercourse Act of 1793, waived its Eleventh Amendment immunity with respect to claims arising out of that purchase. That holding was based upon this Court's decision in *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964), that a state which has left "the sphere that is exclusively its own" and entered a field subject to a Congressional enactment thereby subjects itself to liability arising out of that enactment "as fully as if it were a private person or a corporation." 719 F.2d at 544.[1] Because the State here had *actual*,

[1] The decision of the Court of Appeals dated September 20, 1983, and set forth as Appendix "D" to the State's petition for a writ of certiorari, has now been reported at 719 F.2d 525 (2d Cir. 1983).

not just constructive, knowledge of the prohibitions of the 1793 Act, yet chose to ignore that statute and make a proprietary purchase of land subject to the Act, the Court held that it had waived its immunity with respect to claims arising out of the illegality of that purchase.

The Court's decision was nothing more than a straightforward application of *Pardon*. It distinguished *Employees* v. *Missouri Public Health & Welfare Dept.*, 411 U.S. 279 (1973) and *Edelman* v. *Jordan*, 415 U.S. 651 (1974), on the grounds that neither state in those cases had "sufficient notice that it would be liable for damages if it participated in the federal programs," and that as a result neither state had a real option between terminating vital public services and waiving its Eleventh Amendment immunity. 719 F.2d at 544. The Court did not hold, notwithstanding the contention of the State, that the "mere fact that New York may have entered into a federally regulated sphere of activity" was sufficient. *See* Petition for Certiorari, at 16.

The State further contends that there is no evidence of a Congressional intent to create a private right of action against a state under the Trade and Intercourse Act, and that therefore under *Edelman* there can be no waiver of immunity for such an action. Petition for Certiorari, at 16-17. The Counties agree that no private right of action ought to exist, in favor of Indian plaintiffs or anyone else; but having held that such a right exists for plaintiffs, it would be anomalous and unreasonable to hold further that Congress intended that only partial justice be done, and that the very violator of the statute not be charged with liability.[8]

[8]The State additionally claims that its purchase of the land was made as a "sovereign", not as a proprietor, and that therefore *Pardon* does not control. The State, however, did not purchase the land for parklands, schools, and police stations, but for resale to speculators and settlers. Indeed, "[w]ithin two years, the State in turn sold much of the land to white settlers for about $1.53 per acre." 719 F.2d at 559.

In summary, the court below applied clear and well-established law to the Eleventh Amendment claim, and further review by this Court is unnecessary.[9]

2. The Conclusion of the Court Below that the Third-Party Claim Is Within the Subject Matter Jurisdiction of the Court Was Based upon Well-Established Principles of Federal Law and Does Not Warrant Review by This Court.

It is elementary that a third-party complaint arising under state law falls within the ancillary jurisdiction of the federal courts if it arises out of the "same core of facts" as the original action. *See, e.g., Dery* v. *Wyer*, 265 F.2d 804, 807 (2d Cir. 1959). Cases where state law indemnity claims have been held to be within the ancillary jurisdiction of the federal courts are legion. *See, e.g., Pennsylvania R.R. Co.* v. *Erie Ave. Warehouse Co.*, 302 F.2d 843 (3rd Cir. 1962); *Waglander-Peterson Co.* v. *Great N. Ry. Co.*, 201 F.2d 408 (8th Cir. 1953).[*] Furthermore, where a state is precluded from raising an Eleventh Amendment defense, it is fully subject to an ancillary state law claim. *Laird* v. *Chrysler Corp.*, 92 F.R.D. 473, 474 (D. Mass. 1981); *Chicago & North Western Transportation Co.* v. *Hurst Excavating Co.*, 488 F. Supp. 1, 3 (N.D. Iowa 1978).

[9]Because the court relied upon *Pardon*, the ruling below is unaffected by this Court's ruling in *Pennhurst State School & Hospital* v. *Halderman*, 52 U.S.L.W. 4288 (Jan. 10, 1984), which did not consider the waiver principles of *Pardon* and *Employees*.

[*]*See also Laird* v. *Chrysler Corp.*, 92 F.R.D. 473 (D. Mass. 1981); *Gunnell* v. *Amoco Oil Co.*, 480 F. Supp. 97, 98 n.1 (W.D. Mich. 1980); *Rose* v. *Penn Central Transportation Co.*, 433 F. Supp. 300 (W.D. N.Y. 1977); *Lyons* v. *Marmad, Inc.*, 46 F.R.D. 483 (S.D. N.Y. 1969); *Feng* v. *United States*, 81 F.R.D. 380 (N.D. Cal. 1987).

Indeed, for the most part, the State essentially concedes that this Court has ancillary jurisdiction over the state law claim for indemnity, arguing only that the Eleventh Amendment stands as a bar. The cases on which it primarily relies, such as *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940), and *Jones* v. *Scofield Bros., Inc.*, 73 F. Supp. 365 (D. Md. 1947), simply hold that sovereign immunity may bar an otherwise valid third-party claim.[9]

There is nothing, in short, in the rulings below as to subject matter jurisdiction which is not hornbook law. Further review by this Court is simply not warranted.

I. The Conclusion of the Court Below That the Counties Were Entitled to Indemnity Was Based Upon Well-Established Principles of New York Law and Does Not Warrant Review by this Court.

Having determined that (a) the State was not immune from suit and (b) ancillary jurisdiction existed for the third-party

[9]The State's citation of *Aldinger* v. *Howard*, 427 U.S. 1 (1976), for the proposition that the State cannot be subject to suit on a state-based claim in federal court is wholly inapposite and misleading. *Aldinger* involved a suit against a county and several of its officials, brought under 42 U.S.C. § 1983 and state law, with jurisdiction conferred by 28 U.S.C. § 1343(3). Because the county was not then subject to suit under § 1983, the claim against it stated only issues of state law. This Court held that the *pendent* jurisdiction of the federal courts did not extend so far as to permit the joinder of the county, over which independent federal jurisdiction did not exist. It expressly declined to make a sweeping pronouncement as to jurisdictional principles, 427 U.S. at 13, and specifically limited its holding to *pendent* jurisdiction in claims brought under §§ 1343(3) and 1983. *Id.*, 427 U.S. at 16. Ancillary jurisdiction, which by definition involves impleading a party over whom the federal court would not otherwise have jurisdiction, is a distinct concept. The fundamental distinction is that the plaintiff chose the federal forum, while the defendant, who was forced into federal court, should not have to bear the expense of a separate lawsuit in state court. *See Testa* v. *Winquist*, 451 F. Supp. 388, 390 (D. R.I. 1978).

complaint, the courts below concluded that the State was liable in indemnity to the Counties. In so holding, the courts applied well-established principles of New York law, affirmed as recently as 1980.

> "It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity.' Restatement, Restitution, § 76." *McDermott* v. *City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643, 646 (1980).

719 F.2d at 543.

The State now argues that the courts below should not have applied New York law of indemnity, but rather a New York principle barring the implication of covenants in conveyances of real estate. In essence, the State contends that both the District Court and the Court of Appeals incorrectly interpreted New York state law. The Counties submit that it is not necessary for this Court to exercise its certiorari jurisdiction to review issues of state law which do not implicate constitutional values and which, indeed, do not even represent departures from established legal principles.

In any event, the decision of the court below was clearly correct. If any sense is to be made of this lawsuit, which is ostensibly brought to vindicate the Trade and Intercourse Act, the wrongdoer must be charged with the liability. Anything short of that results in the unjust enrichment of the wrongdoer, and a clear injustice to the party forced to pay. *See Gordon* v. *Burr*, 506 F.2d 1080, 1084-85 (2d Cir. 1974). The court below

simply applied established New York law to ensure that the liability was justly placed on the proper party.[9]

In summary, the courts below correctly applied the law of New York with respect to the Counties' claim for indemnity, and there is no reason for this Court to review their conclusions.

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[9] Nothing in the law of New York which precludes the implication of covenants in conveyances of real property prevents the claim over for indemnity asserted here. The Counties' claim is one sounding in tort (although indemnity rights are styled as "quasi-contractual"), not one for an implied covenant of quiet enjoyment. That principle also clearly contemplates an arms-length sale of real property, where the grantee can protect itself by requiring covenants in the deed; this action is not generic and cannot be controlled by a law with a vastly different purpose. The quasi-contract is only a "vehicle" to an equitable result, and cannot serve as a limitation on the right to recovery. *See McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980).

The State's contention that the conclusion of the Court of Appeals "would completely upset the law of real property," State's Petition at 30, is wholly without merit. The holding below would not allow a "garden-variety" grantee to sue his grantor for implied indemnity where title has failed, any more than this Court's holding in this action in 1974 permits non-Indian grantees to bring suit in federal court. *See* 414 U.S. at 684 (Rehnquist, J., concurring).

Conclusion.

For the foregoing reasons, that portion of the State's petition for a writ of certiorari which relates to the claims for indemnity against it should be denied.

Respectfully submitted,

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Dated: February 28, 1984

AMICUS CURIAE

BRIEF

Nos. 83-1065, 83-1240

IN THE

Supreme Court of the United States

Office Supreme Court, U.S.
FILED
JUN 14 1984
ALEXANDER L. STEVAS,
CLERK

October Term, 1983

THE COUNTY OF ONEIDA, NEW YORK, *et al.*,
Petitioners,

vs.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

vs.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF AMICI CURIAE CITY OF ESCONDIDO, ESCONDIDO MUTUAL WATER COMPANY, AND VISTA IRRIGATION DISTRICT IN SUPPORT OF PETITIONERS

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THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

BRIEF OF AMICI CURIAE CITY OF ESCONDIDO, ESCONDIDO MUTUAL WATER COMPANY, AND VISTA IRRIGATION DISTRICT IN SUPPORT OF PETITIONERS

Interest of Amici Curiae.

Amici are the City of Escondido, Escondido Mutual Water Company and Vista Irrigation District. This brief is in support of Petitioners Counties of Oneida and Madison, New York and the State of New York.[1]

[1] Pursuant to Rule 36.2 Amici have filed letters of consent from all parties with the Clerk of this Court.

Amici are defendants in a suit brought by five Mission Indian Bands and the Secretary of the Interior: *Rincon Band, et al. v. Escondido Mutual Water Co., et al.*, U.S. Dist. Ct., S.D. Cal. Nos. 69-217-S, 72-271-S and 72-276-S. The Bands and Interior seek to void certain water and right-of-way contracts and permits, and request declaratory and injunctive relief in addition to millions of dollars in damages for alleged breaches of contract, trespasses and wrongful diversion of Indian water dating from 1895.[2]

A dispositive issue in that case[3] is similar to one here — whether the claims are barred by applicable statutes of limitations or equitable doctrines such as laches.

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[2]The controversy is being waged in two additional fora: (1) *Rincon, et al. Bands of Indians v. United States*, Claims Court Docket 80-A (suit seeking damages for violation of Indian water rights); and (2) *Escondido Mutual Water Co., et al. v. La Jolla Band of Mission Indians* (1984) ___ U.S. ___, 52 U.S.L.W. 4588 (dispute over Federal Energy Regulatory Commission's jurisdiction to license federal power project which crosses Indian lands).

[3]On January 10, 1980, the district court granted partial summary judgment ruling that "The affirmative defenses of estoppel, laches, waiver, federal and state statutes of limitations, adverse possession, prescription and acquiescence . . . are insufficient as a matter of law."

Although the district court ruled that its decision involved "controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the United States Court of Appeals for the Ninth Circuit did not permit an interlocutory appeal.

Summary of Argument.

The Oneidas' 175-year-old claims are time-barred. Contrary to the Second Circuit's implication, Indian tribes are subject to applicable federal or state statutes of limitations. The only issue is which statute applies. Here, where there is no express federal limitations statute (28 U.S.C. § 2415 is not applicable), the Oneidas' claims are subject to applicable borrowed state statutes of limitations. Application of the state limitations period in this case would not be anomalous or inconsistent with the federal policies underlying the 1793 Non-Intercourse Act.

Moreover, these claims are barred by equitable defenses such as laches. The 175-year delay is patently unreasonable and has prejudiced numerous innocent third parties.[4]

ARGUMENT.

I.

THE ONEIDAS' CLAIMS ARE BARRED BY APPLICABLE STATE STATUTES OF LIMITATIONS.

The Second Circuit's refusal to apply the applicable state statute of limitations to the Oneidas' claims (Joint Appendix (JA) 232a-33a) was based on three erroneous assumptions: (1) statutes of limitations never run against Indian land claims; (2) borrowing the state limitations statute would be inconsistent with the federal policies underlying the 1793 Non-Intercourse Act[5]; and, (3) because 28 U.S.C. section 2415 would be the appropriate limitations statute in a suit brought by the United States, it would be anomalous to apply a different limitations statute to the Oneidas' claims.

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[4]Although Amici believe that the Second Circuit also erred in its other holdings, they are briefing only the issue of whether the Oneidas' claims are time-barred.

[5]Act of March 1, 1793, 1 Stat. 329.

Indian land claims, however, are subject to applicable federal or state statutes of limitations. The only issue is which limitations period applies. This issue is resolved by identifying an express federal limitations statute, or in its absence, borrowing the most analogous state limitations statute. Here there is no express federal limitations statute. Both the express language of 28 U.S.C. section 2415 and its legislative history confirm that it was to apply only to the United States — not to Indians or Indian tribes. Accordingly, the Oneidas' claims are subject to the applicable borrowed state statute of limitations.

Contrary to the Second Circuit's holding, application of a state limitations statute would not be inconsistent with the federal policies underlying the 1793 Act. Nor would it be anomalous to apply a limitations period to the tribes' claim that is different from that which would be applied to a similar suit brought by the United States.

A. Indian Claims Are Subject to Statutes of Limitations.

1. Indian Claims Are Subject to Federal Statutes of Limitations.

Courts always have held that *applicable* federal statutes of limitations bar Indian claims. *See, e.g., Barker v. Harvey* (1901) 181 U.S. 481, 490 (Mission Indian land claims barred because not presented to the Federal Land Commission within the two-year period required by the Act of March 3, 1851, 9 Stat. 631); *Super v. Work* (1925 D.C. Cir.) 3 F.2d 90, *aff'd. per curiam* (1926) 271 U.S. 643 (Karok Tribe land claims dismissed for failure to file claims pursuant to the Act of March 3, 1851); *Capoeman v. United States* (1971 Ct. Cl.) 440 F.2d 1002, 1004 (individual Indian's suit to recover charges made by the government incident to its sale of timber on plaintiffs' trust allotment barred by 28 U.S.C. section 2501); *Andrade v. United States* (1973 Ct. Cl.) 485 F.2d 660, *cert. denied* (1974) 419 U.S. 83 (Pitt River Tribe's suit to overthrow a 1964 Indian Claims Commission judgment barred by the six-year statute of limitations of 28 U.S.C. section 2501); *Hydaburg Co-op Ass'n v. United States* (1981 Ct. Cl.) 667 F.2d 64, 69-70, *cert. denied* (1982) 459 U.S. 905 (Chartered Indian corporation's claims for mismanagement of cannery operation barred by 28 U.S.C. section 2501); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.* (1982 5th Cir.) 690 F.2d 1157, 1160, *cert. denied* (1983) ___ U.S. ___, 78 L.Ed.2d 83 (Tribal land claims barred for failure to file claims under the Act of March 2, 1805, 2 Stat. 324 et seq.); *Menominee Tribe of Indians v. United States* (1984 Fed. Cir.) 726 F.2d 718, 720-22 (action for mismanagement of tribe's forest resources barred by 28 U.S.C. section 2501).

See also Mann v. United States (1968 9th Cir.) 399 F.2d 672, 673, where the court rejected a Navajo Indian's argument that the 28 U.S.C. section 2401's two-year period should not apply to him because he was an Indian and a ward of the government.

Congress has recognized that statutes of limitations apply to Indians and on several occasions has expressly modified or waived statutes of limitations for Indians. *See, e.g.*, Indian Claims Commission Act § 70a, 60 Stat. 1049 (former 25 U.S.C. § 70a) which authorized the Commission to hear claims accruing before August 13, 1946 "on behalf of any Indian tribe band or other identifiable group of American Indians . . . notwithstanding any statute of limitation or laches."[3]

The Indian Claims Commission Act itself required that all claims be filed on or before August 13, 1951, section 70k (former 25 U.S.C. § 70k). *See, e.g., Navajo Tribe of Indians v. United States* (1979 Ct. Cl.) 601 F.2d 536

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[3]Other federal statutes have waived statutes of limitations for Indians. *See Federal Indian Law* (1958 Dept. of Int.) 351 n.52.

(tribal claims withdrawn after 1951 could not be refiled and were barred by section 70k).

2. Indian Claims Are Subject to State Statutes of Limitations.

Courts also have held that state statutes of limitations can bar Indian claims. In *Seneca Nation v. Christy* (1896) 162 U.S. 283, the Seneca Nation sued in state court for damages and to recover possession of land taken from them in 1826 pursuant to certain treaties and compacts. The defendant argued, *inter alia*, that the action was barred by a New York statute of limitations. The trial court ruled for defendants and the New York Court of Appeals affirmed.

On writ of error, the United States Supreme Court affirmed, and quoted from the Court of Appeals' opinion:

> "We are also of opinion that [sic because] the right of the plaintiff to sue was given by and is dependent upon the statute, chapter 150 of the Laws of 1845 (*see Strong v. Waterman*, 11 Paige, 607) the statute of limitations is a bar to the action." 162 U.S. at 288.

Other cases applying state statutes of limitations to Indian claims include: *Schrimpscher v. Stockton* (1902) 183 U.S. 290, 296-97 (where treaty made Indians citizens[1] and subject to the laws of Kansas, individual heirs of Indian were barred by state statute of limitations from recovering tract of land); *Stewart v. Keyes* (1935) 295 U.S. 403, 416-17 (suit by Creek Indians to recover land was barred by Oklahoma statute of limitations, and to the extent that Act of April 12, 1926, 44 Stat. 239, purported to extend statute of limitations for Indians it was void as a denial of due process); *Wolfe v. Phillips* (1949 10th Cir.) 172 F.2d 481, 484-86, *cert. denied* (1949) 336 U.S. 968 (where Act of April 12, 1926, 44 Stat. 239, made Indians of five civilized tribes subject to the Oklahoma statute of

[1]The Act of June 2, 1924, 43 Stat. 253, made all Indians citizens of the United States.

limitations, their suit to recover possession of land was barred by state statute of limitations); *see also Lamont v. Haig* (1982 D. S.Dak.) 539 F. Supp. 552, 557 n.4 (where federal common law cause of action for violation of constitutional rights was not subject to express federal statute of limitations court looked to analogous state statute of limitations to determine whether Indians' claims were barred).

Thus, the real issue is not whether statutes of limitations can bar Indian claims, but rather which statute — federal or state — applies to a given claim.

B. Because No Federal Statute of Limitations Expressly Applies to the Oneidas' Claims, the Court Should Apply the Applicable State Limitations Period.

No express federal statute of limitations applies to these Indian claims. The 1793 Act neither expressly creates nor limits any private cause of action. Its penalties and disabilities, however, do expressly abate after two years. (*See* Appendix to Counties', Petition for Certiorari (PA) 58a)

Contrary to the Second Circuit's implication (JA 232a-33a), 28 U.S.C. section 2415 does not apply to claims brought by Indian tribes. Both its express language and its legislative history confirm that it was intended to apply only to claims brought by the United States, and not to claims brought by Indians themselves, even if they *could* have been brought by the United States.

1. 28 U.S.C. Section 2415 Does Not Apply to the Oneidas' Claims.

a. Section 2415 Was Not Intended to Apply to Claims Brought by Indian Tribes.

On its face, section 2415 applies certain limitation periods only to actions "brought by the United States" (PA 70a-72a).

Congress' intent in enacting section 2415 in 1966 was for the first time to establish statutes of limitations generally applicable to actions brought by the United States.[8] *Crown Coat Front Co. v. United States* (1967) 386 U.S. 503, 521 n.4; Hearings on H.R. 13652 before Subcomm. No. 2 of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 3-4 (1966); H.R. No. 1534, 89th Cong., 2d Sess. 3-4 (1966).

As originally enacted, section 2415 did not expressly apply to suits brought by the United States on behalf of Indians; however, it did limit suits by the United States "to recover damages from a trespass on lands of the United States, including trust and restricted Indian lands" to a six-year period.[9]

On July 18, 1972, Congress passed an emergency bill (Pub.L. 92-353, 86 Stat. 499) which: (a) made the original six-year limitation periods expressly applicable to actions for money damages (§ 2415(a)) and trespass damages (§ 2415(b)) brought by the United States "on behalf of a recognized tribe, band or group of American Indians"; and (b) extended the periods for an additional ninety days. The ninety-day extension prevented expira-

[8]Prior to its passage, unlike the situation in regard to Indian claims (*see, supra*), statutes of limitations generally had been held inapplicable to the United States when it sued to assert public or governmental as opposed to private rights. *United States v. Summerlin* (1940) 310 U.S. 414, 416.

The United States has been held subject to statutes of limitations where it: (a) sues as a nominal plaintiff to vindicate purely private rights (*see, e.g., United States v. Beebe* (1888) 127 U.S. 338); (b) brings an action under a state statute which creates a right which did not exist at common law and specifies a limitations period (*see, e.g., United States v. Harpootlian* (1928 2d Cir.) 24 F.2d 646); and, (c) sues to protect its proprietary as opposed to public rights. (*See, e.g., United States v. Summerlin, supra.*)

[9]28 U.S.C. section 2415(g) deemed the right of action to have accrued on the date of enactment (*i.e.*, July 18, 1966). Thus claims by the United States would not have been barred until six years later (*i.e.*, July 18, 1972).

tion of the original limitations periods pending consideration of other bills which had been introduced which would further extend the periods. In explaining the need for the ninety-day extension, Senator Jackson appended to his remarks a July 14, 1972 Wall Street Journal article which noted that expiration of the limitations period:

> "would prevent the government from seeking payment for damages more than six years old. Interest accrued in such cases can be substantial, since Indian cases sometimes go back 100 years or more. Whether Indians could file their own suits for financial damages going back more than six years is unclear, says a legal official in the Department of the Interior. The issue will probably have to be settled in the courts." 118 Cong. Rec. 23,966 (1972)

Thereafter, during hearings on a five-year extension before the Subcommittee on Indian Affairs, William A. Gershuny, Associate Solicitor for Indian Affairs, testified:

> One of the reasons, Senator, why it's so essential that the suits be filed, that some claims be filed by the United States, is the possibility that if the tribe itself in its own name files the suit it would be subject to a shorter statute of limitations than would otherwise be applicable to the Federal Government.

Hearings on S. 3377 and H.R. 13825 Before the Subcomm. of Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong. 2d Sess. 18-19 (1972).

In concluding his testimony, Gershuny commented on a suggestion that section 2415 be amended to apply to actions brought, not only by the United States, but by the Indians themselves:

> Senator Fanin. . . . The legal services suggest that the words "United States for or on behalf of" be stricken,

on the theory that should a cause of action be extended they [Indians] could bring action on their own.....

Mr. Gershuny. I have not seen that [suggestion] before, but it would seem to me, Senator, that *their proposal is based on the erroneous assumption that Section 2415 is a statute of limitations, which would apply to the tribe if it filed its own suit.* We don't read Section 2415 that way. I have a lot of difficulty in understanding how 2415 could be applicable if the tribe itself filed suit. My first reaction, Senator, is that I think that the proposal is simply bottomed on a false assumption. *Id.* at 23. (emphasis added.)

On October 13, 1972, Pub. L. 92-485, 86 Stat. 803, was enacted extending the time for the United States to bring Indian money and trespass claims until July 18, 1977 Congress subsequently enacted other extensions.[10]

Congressional debates over these various extensions confirm that Congress did not intend section 2415 to apply to claims brought by the Indians themselves. *See, e.g.*, 123 Cong. Rec. 22499 (1977) (remarks of Rep. Cohen, ... "this bill does not deal with the issue of suits by Indian tribes"); *Id.* at 22511 (remarks of Rep. Udall, "Not once during consideration of [section 2415] was the issue of Indian claims against third parties raised and no Indian witnesses were heard. In fact, it is doubtful that Congress even intended that the act would apply to such Indian claims."); H.R. Rep. No. 96-87, 96th Cong., 2d Sess.

[10]On July 11, 1977, Congress enacted Pub.L. 95-64, 91 Stat. 268, extending the time periods to August 18, 1977. On August 15, 1977, Congress enacted Pub.L. 95-103, 91 Stat. 842 extending the time periods to April 1, 1980. On March 27, 1980, Congress enacted Pub.L. 96-217, 94 Stat. 126 extending the time periods to December 31, 1982. On December 30, 1982, Congress enacted Pub.L. 97-394, 96 Stat. 1976, which established the current time periods.

(1980) ("The claims concerning Indians and Indian tribes which are affected by Section 2415 ... are brought by the United States as trustee on behalf of the Indians. The Indians themselves do not bring such actions on their own behalf.")[11]

Thus, the legislative history of section 2415 and its amendments clearly shows that Congress had no intention to extend its benefits to suits brought by Indian tribes or bands.

28 U.S.C. section 2416 is further evidence that Congress did not intend section 2415 to apply to Indian tribes. Section 2416 establishes certain exclusions from the time period specified by section 2415 including those periods of time when the United States cannot be reasonably charged with knowledge of the requisite material facts. No such exclusion, however, is made for Indian tribes.

b. ***There Is Nothing Anomalous in Applying Different Limitations Statutes to Indian Tribes and the United States.***

Despite section 2415's express language and legislative history, the Second Circuit erroneously concluded that it would be anomalous to allow the United States as trustee to sue under more favorable conditions than those afforded the tribes themselves. (JA 232a).[12] This holding

[11]See also 123 Cong. Rec. at 22500 (remarks of Rep. Foley); *Id.* at 22507 (remarks of Rep. Dicks); *Id.* at 22510 (remarks of Rep. Yates); 126 Cong. Rec. H1945 (1980) (remarks of Reps. Danielson and Marlenee); *Id.* at S1641 (remarks of Sen. Melcher); *Id.* at S1642 (remarks of Sen. Cohen); but *cf.* S. Rep. No. 96-569, 96th Cong., 2d Sess. (1980) 4.

[12]The courts which have reached similar conclusions (see *e.g. Capitan Grande Band of Mission Indians v. Helix Irrigation District* (1975 9th Cir.) 514 F.2d 465, 469-71, *cert. denied* 423 U.S. 874; *Narragansett Tribe v. Southern Rhode Island Land Dev. Corp.* (1976 D.R.I.) 418 F. Supp. 798, 805; *Oneida Indian Nation v. State of New York* (1982 2d Cir.) 691 F.2d 1070, 1083-84)

(footnote continued on following page)

ignores the very fundamental policy considerations which exist in a suit by the United States as opposed to an Indian tribe.

The United States, because of its unique position of public trust, historically has been entrusted with the traditional, although diminishing (*see, e.g.*, 28 U.S.C. § 2415), right of the sovereign to be free from the application of statutes of limitation, whether it sues on its own behalf (*United States v. Summerlin*, 310 U.S. 414, 416 (1940)) or in its role as a trustee[12] to protect restricted Indian property. *Board of County Comm'rs v. United States* (1940) 308 U.S. 343, 351.

Courts consistently have held that where the United States sues to enforce public rights in its role as a fiduciary or trustee, such an action is not subject to borrowed state limitations periods which would bar suits by individual beneficiaries to enforce identical rights. (*See, e.g., United States v. Fort Benning Rifle and Pistol Club* (1967 5th Cir.) 387 F.2d 884, 887 (The United States' subrogated right to recover medical expenses provided an injured person under the Medical Care Recovery Act, 42

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commined the same errors. Although each court conceded that section 2415 was not intended to apply to suits by Indians, each concluded that it should nevertheless apply because it would be anomalous to apply a different limitations period. Their conclusions ignore the fact that if Congress did not intend section 2415 to apply, it must have intended some other limitations period to apply. *See, e.g., Adams v. Woods* (1805) 6 U.S. (2 Cranch) 336, 342. As did the Second Circuit, they also erroneously concluded that Indian tribes stand in the shoes of the United States when they sue. These cases help explain the aberrant remarks in S. Rep. No. 96-569, *supra* n. 11, which are contra to all other indicia of Congressional intent.

[12]There is nothing anomalous about a trustee being given a longer limitations period to assert a right than that given his beneficiary to assert the same right. For example, the Bankruptcy Code, 11 U.S.C. section 108, provides a trustee who steps into the shoes of a debtor a longer period of time to file a petition than that enjoyed by the debtor.

U.S.C. section 2651, *et seq.*, was not subject to the state statutes of limitations that would have barred the injured person's claim); *Nabors v. National Labor Relations Board* (1963 5th Cir.) 323 F.2d 686, 688-89 (Back pay claims brought by United States on behalf of private individuals were not barred by state statute of limitations applicable to private actions because the United States was suing to enforce public rights); *Securities and Exchange Comm'n v. Penn Central Co.* (1976 E.D. Pa.) 425 F. Supp. 593, 599 (SEC's suit to force disgorgement of money unlawfully obtained was not barred by state statutes of limitations that would apply to the individual investors because Commission was "acting in accordance with its public responsibilities on behalf of the public interest.").)

Here, the Second Circuit erroneously concluded that the Oneidas merely are asserting the *same* rights that the United States would have been asserting had it brought suit. The Oneidas, however, are suing to vindicate tribal interests, not the public interest that would have been represented by the United States had it sued.

The difference between what the United States views as its *public* interest in this suit as opposed to the *tribal* interest represented by the Oneidas is illustrated by the simple fact that the United States did not elect to sue in this case. Instead, the United States has indicated to the Oneidas that it believes that it fulfilled its duty to them by providing a forum (Indian Claims Commission) for determining whether they should be compensated for injuries allegedly sustained as a result of their early dealings with the State of New York. (JA 42a-44a).

The United States correctly views the public interest in this case as different from the Oneidas' interests. Unlike the Oneidas, the United States does not represent only a single segment of society. It is presumed to act

in the best interests of all people when it sues to enforce a public right.[14]

Thus in exercising its discretion not to sue in this case, the United States undoubtedly considered its trust responsibilities to the nation as whole and concluded that it would be inequitable to press 175-year-old claims against innocent parties where both it and the Indians had slept on their rights. The United States also may have believed that the problem should be resolved through the legislative process. In any event, its perception of the public interest led it to a decision not to sue.[15] Therefore it

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[14]This fiduciary duty is best expressed in *Federal Indian Law* (1958 Dept. of Int.) 2:

> [N]othing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States.

[15]See Letter from Griffin Bell, Attorney General, to Hon. Cecil Andrus, Secretary of the Interior, June 30, 1978, S. Rep. No. 96-569, 96th Cong., 2d Sess. (1980) 12, 13, wherein the Attorney General gave the following reasons for not bringing suit against private parties on behalf of the Oneidas and other tribes:

> After careful thought, I have decided that I will not bring suit against the landowners in the New York, South Carolina, or Louisiana claim areas. I have a number of questions about the legal and factual issues in these suits and question whether they can be won. Furthermore, the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them. Finally, the Administration's policy decision to relieve small landowners in Maine from suit through a legislative settlement recommends the same relief to others similarly situated.

is wrong to assume that the Oneidas merely are standing in the United States' shoes and asserting the United States' public interests. Only a private litigant would press his claim regardless of its inequitable impact on thousands of innocent people. A true sovereign has a duty to represent the public interest and must accordingly exercise restraint.[16]

2. Absent an Express Federal Limitations Period, Federal Courts Apply Analogous State Statutes of Limitation.

This Court has interpreted the Rules of Decision Act (RDA)[17] to require application of state statutory or common law rules unless otherwise required by the Constitution or federal statutes and treaties. *See Erie R.R. v. Tompkins* (1938) 304 U.S. 64, 78.

Courts initially held that where Congress was silent as to the applicable statute of limitations for a federally created right, the RDA mandated the borrowing of the most analogous state statute of limitations. *See e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*

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[16]Unlike the United States, Indian tribes are not true sovereigns. Tribes may not exercise powers of autonomous states which are "inconsistent with their status." *Oliphant v. Suquamish Indian Tribe* (1978) 435 U.S. 191, 208. Their sovereignty exists only at the sufferance of Congress and is subject to complete defeasance. *United States v. Wheeler* (1978) 435 U.S. 313, 323. The modern trend has been to apply notions of Indian sovereignty only to the governing of existing reservation lands and tribal members. *Rice v. Rehner* (1983) ___ U.S. ___, 77 L.Ed. 2d 969-70. Here the Oneidas' limited sovereignty does not free them from statutes of limitations since such authority would be inconsistent with their status. Cf. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, supra* at 52 U.S.L.W. 4594 n30.

[17]The RDA, 28 U.S.C. section 1652, states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(1906) 204 U.S. 390; *Campbell v. Haverhill* (1895) 155 U.S. 610; *McClung v. Silliman* (1830) 28 U.S. (3 Pet.) 270.

Modernly, Courts have abandoned the position that the RDA *compels* the application of state statutes of limitation. *See* Special Project, Time Bars In Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitation, 65 Cornell L. Rev. 1011, 1025-35 (1980). Instead, Courts have adopted the position that application of state limitations statutes is a matter of judicial discretion, controlled by the *presumption* that where Congress creates a cause of action without specifying a period for enforcement, it intends that the most analogous state limitations statute be applied. *United Parcel Service, Inc. v. Mitchell* (1981) 451 U.S. 56, 60-61; *Board of Regents v. Tomanio* (1980) 446 U.S. 478, 483-84; *Runyon v. McCrary* (1976) 427 U.S. 160, 179-82; *International Union, etc. v. Hoosier Cardinal Corp.* (1966) 383 U.S. 696; *Holmberg v. Armbrecht* (1946) 327 U.S. 392. Courts have carved out two exceptions to this general rule. First, a Court will not borrow a state limitations statute where the time period is so short that it emasculates underlying federal policies. *See, e.g., Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n* (1977) 432 U.S. 355, 367. Second, Courts will not borrow a state statute which discriminates against a federal right by providing a longer limitations period for an analogous state right. *See, e.g., Van Horn v. Lukhard* (1975 E.D. Va.) 392 F. Supp. 384, 389-91.

Here, the Second Circuit refused to borrow an analogous state limitations period because it erroneously believed such a period would be inconsistent with the federal policies underlying the 1793 Act. (JA 232a).

3. Application of New York Limitations Statutes Would Not Be Inconsistent With the Alleged Federal Rights Asserted by the Oneidas.

The Second Circuit stated that borrowing an applicable state limitations statute in this case would be inconsistent with the policies underlying the 1793 Non-Intercourse Act because it would allow a violation of the Act to go unremedied. The court's rationale, however, proves too much. Every statute of limitations operates to bar a claim. The Second Circuit's rationale would prevent the borrowing of state limitations statutes in any case involving federal claims.[18]

In *Board of Regents v. Tomanio* (1980) 446 U.S. 478, this Court borrowed both a state statute of limitations and a state tolling rule in finding that a plaintiff's 42 U.S.C. section 1983 action was time-barred. In concluding that the state statute of limitations would *not* be inconsistent with the federal policies underlying section 1983, merely because it barred the claim, the Court stated:

> "[A] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." [citation] Neither of [the] policies

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[18]To the extent that the District Court believed that the supremacy clause prevented state *decisions* from barring *federal* claims (JA 73a), it ignored the fact that where Congress impliedly incorporates local limitations periods into a statute, the defense is itself part of federal law. *See, e.g.*, Special Project, *supra*, 65 Cornell L. Rev. at 1029 (The assumption "that a state [limitations] period may not operate . . . to limit a federal right . . . misconstrue[s] the operation of federal common law. Once a federal court fills a gap in federal law, the gap-filler, whether judicially-created or absorbed from the state, *becomes* federal law."

> [underlying 1983 — deterrence and compensation] is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.

446 U.S. at 488.

Moreover, as the *Tomasio* Court also pointed out, the state policies of repose that underlie state limitations are consistent with the federal policies of repose that are implicit in every cause of action created by Congress where it does not expressly establish a limitations period:

> "The importance of policies of repose in the federal, as well as in the state, system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless 'borrowed' what is considered to be the most analogous state statute of limitations to bar tardily commenced proceedings. [citation] This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a 'cause of action' or 'claim for relief' that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. Thus in general, state policies of repose cannot be said to be disfavored in federal law." (*Ibid.*)

Thus, the Second Circuit flatly misinterpreted this Court's holding in *Occidental Life Ins. Co.*, *supra*, 432 U.S. at 367, that state statutes of limitations should not be borrowed where they are "inconsistent with the underlying policies of the federal statute."

All that the Court did in *Occidental* was for the first time give effect to this narrow exception to the general

rule.[18] The *Occidental* Court did not consider the state limitations statute inconsistent with the federal law merely because it barred the claim. Rather, it refused to borrow the state statute because as a practical matter the limitations period was too short to permit the EEOC to sue at all in many cases. By the time the typical EEOC charges had completed conciliation, the statute would have run. Application of such a short limitations period would have frustrated the underlying Congressional goal of conciliation and nullified the right Congress gave the EEOC to bring an action.

Since the *Occidental* decision, Courts have continued to give effect to the general rule that state statutes of limitations will be borrowed where Congress is otherwise silent. *See, e.g., United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 60-61; *Board of Regents v. Tomasio*, *supra*, 446 U.S. at 488; *Fiesel v. Board of Education* (1980 E.D.N.Y.) 490 F. Supp. 363, 365; *Ashland Oil Co. v. Union Oil Co. of California* (1977 Em. Ct. App.) 567 F.2d 984, 989.

Here the most analogous state limitations periods are either ten[19] or six[20] years. There is no reason to believe that either period was too short to permit the Oneidas to bring whatever claims they might have under the 1793 Act.[21]

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[18] As Justice Rehnquist noted in his dissent:

> The Court does not now point to any case, not involving the United States in its sovereign capacity, in which, the federal statute being silent, the applicable state limitations period was disregarded in favor of either a judge-made limitations period or, as here, no limitations period at all. (432 U.S. at 375)

[19] N.Y. Civ. Prac. Law, section 212a (ten-year period for commencing action to recover property).

[20] N.Y. Civ. Prac. Law, section 213.1. (six-year period for action for which no limitation is specifically prescribed by law).

[21] In fact the Oneidas were well aware of their potential claims and protested to the United States at least as early as 1840 and "innumerable times" between 1909 and 1965. (JA 60a, 213a).

Thus, as in *Tomonie*, *supra*, the state statute of limitations is not inconsistent with any federal policies underlying the 1793 Act because the Oneidas could have enforced their claims simply by commencing their actions within the applicable time period. Moreover, the state policies of repose contained in the New York statute, like those in *Tomonie*, also are consistent with the federal policies of repose necessarily implicit in the 1793 Act.

Congress has evidenced its belief that similar or even shorter periods of time are ample to permit Indian claims such as the Oneidas' to be brought against the United States. Courts consistently have held that Indian land claims, when brought against the United States in United States Claims Court, are subject to the six-year limitation period in 28 U.S.C. section 2501. *See, e.g., Menominee Tribe of Indians* v. *United States*, *supra*, 726 F.2d at 720-22; *Fort Mojave Tribe of Indians* (1976) 210 Ct. Cl. 727; *Andrade* v. *United States*, *supra*, 483 F.2d at 604; *Capoeman* v. *United States*, *supra*, 440 F.2d at 1003-06. Courts also have subjected Indians to the two-year limitation of the Federal Tort Claims Act, 28 U.S.C. section 2401(b). *See, e.g., Moses* v. *United States*, *supra*. Both limitations periods are substantially shorter than the New York periods in this case; however, courts have not found that such time bars are inconsistent with any underlying federal policies toward Indians. These limitations periods are also evidence that there is no underlying federal policy of permitting Indian claims to be perpetual; there is a federal policy of repose with respect to such claims.

As Chief Justice Marshall observed in *Adams* v. *Woods* (1805) 6 U.S. (2 Cranch) 336, 342, a case without a limitations period "would be utterly repugnant to the genius of our laws."[20]

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[20]From ancient times, the salutary rule has been recognized that there should come a time when mere sovereign fiat wipes clean any preexisting old debts and obligations. (Cf. Deuteronomy 15:1, debts made uncollectible after seven years.)

II.

THE ONEIDAS' CLAIMS ALSO ARE BARRED BY LACHES AND OTHER EQUITABLE DOCTRINES.

The Second Circuit did not expressly address the issue of laches or the other equitable doctrines, apparently believing them subsumed in its statute of limitations discussion (JA 232a-33a). The district court: erroneously concluded that laches would not bar a similar suit brought by the United States (JA 72a); misread *Ewert* v. *Bluejacket* (1922) 259 U.S. 129, as holding that laches were inapplicable to individual Indian suits to rescind transfers of restricted Indian land (*Id.* at 73a); and, erroneously concluded that because the original transfer violated 25 U.S.C. Section 177 [sic, the 1793 Non-Intercourse Act] equitable doctrines such as laches could not validate the transaction. (*Ibid.*)

Courts, however, have applied equitable doctrines including laches against the United States when it sues on behalf of Indians. In *Ewert* v. *Bluejacket* this Court held merely that laches should not apply under the particular circumstances of that case, not that Indian land claims could *never* be barred by laches. The application of laches always has the effect of validating a challenged transaction regardless of whether it originally was void. Here, where there has been a 175-year delay and prejudice to innocent parties, laches should be applied.

A. Contrary to the Lower Courts' Rulings, Courts Have Applied Laches and Other Equitable Defenses to Bar Indian Claims Brought by the United States.

Although *dicta* in various cases indicate that laches and other equitable defenses never bar the United States when it sues on behalf of Indians (*see, e.g., Board of Comm'rs* v. *United States* (1939) 308 U.S. 343, 351; *United States v. Ahtanum Irrigation Dist.* (1956 9th Cir.) 236 F.2d 231, 334 *cert. denied* (1956) 352 U.S. 988.), in fact, courts have applied laches and similar equitable

doctrines to prevent suit by the United States even when it sues on behalf of Indian tribes. *See, e.g., United States v. Title Ins. and Trust Co.* (1924) 265 U.S. 472, 485-87 (United States' suit on behalf of Mission Indians held barred on the grounds that the court should not overturn its earlier decision [in *Barker v. Harvey* (1901) 181 U.S. 482] which had become a rule of property in California); *United States v. Ft. Smith & W.R. Co.* (1912 8th Cir.) 195 F. 211, 215 (United States held bound by estoppel in suit to collect railroad right-of-way payments for Creek Nation); *Folk v. United States* (1916 8th Cir.) 233 F. 177, 191-93 (delay of more than eleven years barred United States from bringing action on behalf of Creek Nation); *United States v. Rose* (1937 W.D.N.C.) 20 F. Supp. 350, 353-54 (delay of more than forty-eight years barred United States from bringing suit on behalf of Eastern Band of Cherokee Indians); *see also United States v. Eaton Shale Co.* (1977 D. Colo.) 433 F. Supp. 1256, 1272 (United States suit to declare certain land patents void held barred by estoppel and laches where delay was twenty-one years after patent had issued).

B. The Lower Court's Reliance on Ewert v. Bluejacket Is Misplaced.

Contrary to the district court's opinion (JA 73a), *Ewert v. Bluejacket* (1922) 259 U.S. 129, does not hold that Indian claims can never be barred by laches and other equitable defenses. It merely follows the general rule that a defendant who has "unclean hands" may not invoke equitable defenses.

In *Ewert*, Bluejacket, a Quapaw Indian had received a patent for certain Oklahoma land in 1898.[14] In 1902, Congress passed a statute authorizing heirs of a deceased Indian to sell inherited lands subject to various restrictions including the approval of the Secretary of the Interior. Bluejacket died in 1907 and the land passed to his widow and children. In 1909, they sold the land to Ewert. In 1916 the widow and heirs sought to have the deed voided because at the time of the sale, Ewert had been employed as a special assistant attorney-general and had assisted the United States in suits relating to the Quapaw lands. A federal statute prohibited trading between "persons employed in Indian affairs" and the Indians.

[14]The patent contained a restriction that the property could not be alienated for twenty-five years.

This Court first held that the federal act disqualified Ewert from purchasing the land. The Court then stated:

> "He [Ewert] still holds the legal title to the land, and the equitable doctrine of laches, developed and designed to protect *good-faith* transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and bar the rights of Indian wards in lands subject to statutory restrictions." (259 U.S. at 138) (emphasis added)

The cases cited by the *Ewert* Court to support the above proposition did not involve Indians. Instead, all involved situations where the court had acted to apply or not to apply laches on equitable grounds.[15] The doctrine of clean hands certainly did not apply to Ewert. He, after all, had himself participated in the void act.[16] This

[15]*Gallihar v. Cadwell* (1982) 145 U.S. 368, 372 (laches applied and 14 year old homestead right not permitted to disturb title to land); *Halstead v. Grinnan* (1894) 152 U.S. 412, 417 (laches applied to suit to set aside a 25 year old survey); *Northern Pacific R. Co. v. Boyd* (1913) 228 U.S. 482, 500 (laches held not applicable to 10 year delay of nonsecured creditor in attacking a reorganization plan where corporation and stock holders were not prejudiced and delay was excusable, if not avoidable).

[16]Ewert's activities were not limited to this one instance. *See Kendall v. Ewert* (1921) 259 U.S. 139 (decided the same day as

(footnote continued on following page)

"unclean hands" interpretation is supported by the fact that in deciding *Ewert v. Bluejacket*, this Court did not purport to overrule *Felix v. Patrick* (1892) 145 U.S. 317.

C. In Felix v. Patrick This Court Applied Laches to Bar Indian Claims.

In *Felix v. Patrick*, *supra*, Felix, a Sioux Indian, received scrip pursuant to a treaty which entitled her to 480 acres of land.[27] In 1860, certain unknown persons fraudulently obtained from Felix the scrip, a quit claim deed and a power of attorney in blank. In 1861, Patrick obtained the scrip and used it and the deed and power of attorney to obtain 120 acres of property.

In 1887 Felix' heirs sued Patrick to have the deed declared void. The United States Supreme Court affirmed the lower court's ruling that the action was barred by laches. In discussing Petitioner's argument that they could not be barred by equitable defenses such as laches because they had been tribal Indians, the Court stated:

> The real question is whether equity demands that a party who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity, at least, the punishment should not

Ewert v. Bluejacket) (Court voided Ewert's attempts to obtain other Indian land through "straw man" procedures and by obtaining the consent of an Indian claimant who was a "habitual drunkard"). Certainly, the Court was in no mood to listen to any equitable defenses Ewert might have tried to assert.

[27]Similar to the case in *Ewert v. Bluejacket*, the treaty provided that no transfer or conveyance of the scrip would be valid. *See* 36 Stat. 458.

> be disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands. (145 U.S. at 332-33)

The court then considered the equities including that Patrick (unlike Ewert) had not been a party to the fraud (*Ibid*) and that there had been no showing that Felix had not received full value for the scrip (*Ibid*). The Court, in affirming the judgment, stated:

> It is very evident that Patrick bought these muniments of title as hundreds of others bought them — in violation of the letter and policy of the law, but without actually intending to defraud Sophia Felix or any other person. The law pronounces the transaction a fraud upon her but it lacks the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on his part to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties; but as the case stands at present justice requires only what the law, in the absence of the statutory limitation would demand — the repayment of the value of the scrip with legal interest thereon. (*Id.* at 334)

The Court also was concerned that a contrary decision would "result in the unsettlement of larger numbers of titles upon which owners have rested in assured security for nearly a generation." (*Id.* at 335.)[28]

[28]Obviously *if* the Oneida claims are upheld, the results in this case would be even more disastrous.

D. Since Ewert, Courts Have Continued to Apply Laches to Bar Indian Claims.

After *Ewert*, courts continued to bar Indian claims on laches grounds. *See, e.g., Lemieux v. United States* (1926 8th Cir.) 15 F.2d 518, 523 (court held that the facts of the case together with the passage of 35 years barred Lemieux, a Chippewa Indian from maintaining suit to recover allotment); *Barnett v. Riggs National Bank* (1957 D.D.C.) 154 F. Supp. 73, 78 (suit brought to set aside Indian trust barred after delay of 29 years); *Andrade v. United States, supra*, 485 F.2d at 665 (Pitt River tribe suit to overturn Indian Claims Commission judgment barred by 28 U.S.C. section 2501 and by laches); *Armstrong v. Maple Leaf Apartments Ltd.* (1979 10th Cir.) 622 F.2d 466, 471-74, *cert. denied* (1980) 449 U.S. 901 laches applied to bar Indian suit to set aside deed by applying 1947 statute).

More recently, in *Jicarilla Apache Tribe v. Andrus* (1982 10th Cir.) 687 F.2d 1324, an Indian tribe sued the Secretary of the Interior and oil and gas lessees alleging that Interior had failed to comply with its regulations when advertising oil and gas leases on their reservation, and that it had failed to comply with the National Environmental Policy Act (NEPA). The district court awarded the tribe damages for violation of Interior's regulation; however, it rejected the tribe's NEPA claims on a finding of laches and unclean hands on the part of the tribe. The parties appealed.

On appeal, the Tenth Circuit affirmed that the tribe's NEPA claims were barred by laches. The court began its analysis by noting:

> The question whether laches bars an action depends on the facts and circumstances of each case. The issue is primarily left to the discretion of the trial court, but that discretion is, of course, confined by recognized standards. . . . The trial court must find (a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay.

687 F.2d at 1338.

The Court next found that the tribe had unreasonably delayed bringing suit by waiting more than three years to bring the action. (*Ibid.*)

The Court also rejected the tribe's claim that the suit should be found timely filed. The tribe claimed that they had been ignorant of the NEPA violations and had relied on the Bureau of Indian Affairs and that the United States had a fiduciary duty to protect their land.

The Court concluded that the tribe's delay had prejudiced the lessees and quoted from the lower court's decision:

> [T]he delay resulted in prejudice to the lessee defendants. Because they had no notice that anything was amiss with their Jicarilla leases until the institution of this suit, they have invested well over $12 million in leases in the form of bonus payments, rentals, administrative overhead costs, plus exploration, drilling and production costs. Were they to lose their leases, much of that investment would be lost, not to mention the loss of future profits based on investments already made.

Id. at 1339.[28]

See also Peshlakai v. Duncan (1979 D.D.C.) 476 F. Supp. 1247, 1256 (laches barred claim by 72 Navajo Indians that a seven-year-old sale of uranium exploration and mining leases on Navajo lands by the Bureau of

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[28]Here the delay was not 3 years, but 175 years. The potential prejudice to innocent parties from this suit is not 12 million dollars, but some huge multiple of that amount.

Indian Affairs was illegal for failure to prepare an environmental impact statement in accordance with NEPA); *Western Shoshone Legal Defense and Education Ass'n v. United States* (1976 Ct. Cl.) 531 F.2d 495, 503 (laches prevented an Indian legal defense and education association from intervening in claim proceeding before the Indian Claims Commission for taking of land where association had waited 39 years before intervening).

The above cases establish that, at the very least, equitable defenses such as laches and estoppel should not be dismissed as a matter of law without analyzing the facts.[20] *Cf. Covelo Indian Community v. Watt* (1982 D.C. Cir.) 551 F. Supp. 366, 381 (court refused to apply laches to bar Indian class action seeking damages for federal government's failure to abide by federal statute relating to Indian claims only after examining the equities on both sides); *Ute Indian Tribe v. Probst* (1970 10th Cir.) 428 F.2d 491, 496-97 (court found laches inapplicable where delay was only three years and no prejudice was shown).

E. Application of Laches Is Appropriate in This Case.

It is difficult to imagine a more appropriate case than this one in which to apply the doctrine of laches. Here there has been patently unreasonable delay — 175 years — with no excuse given or even conceivable. The prejudice to defendants is obvious. Much of what was then wild land is now intersected by streets, subdivided into blocks and lots and occupied by innumerable innocent purchasers. Land titles believed to be settled for more than one and one half centuries will be disrupted; innocent home owners and businesses may be forced from

[20] *Cf., United States v. Ruby Co.* (1978 9th Cir.) 588 F.2d 697, 701-703, *cert. denied* (1979) 442 U.S. 917 (court of appeals concluded that district court erred when it concluded as a matter of law that estoppel was inapplicable).

their land. The potentially staggering award of damages will be borne by innocent taxpayers.

Unlike in *Ewert v. Bluejacket, supra*, this is not a case where the wrongdoer seeks to have his own illegal contract validated by the passage of time. Here, the Counties did not even exist at the time the challenged conveyances were made. Their hands are clean. They are entitled to evoke the defense of laches.

Here, as in *Felix v. Patrick, supra*, the individuals who participated in the land transaction died years ago. Just as modern Indian tribes are not held responsible for depredations which occurred decades ago, the citizens of New York State also should not be held responsible for any alleged wrongs committed by their agents and representatives almost 200 years ago.[21]

[21] U.S. Const. Art. III, sect. 3, cl. 2 — even in cases of treason, any punishment or forfeiture ends with the death of the traitor.

Conclusion.

This Court has yet to expressly address whether a borrowed state statute of limitations or laches can bar ancient Indian land and damage claims. Under the Second Circuit decision Indian claims can never be barred no matter how old they are or inequitable it may be to enforce them. This Court should not sanction such a pernicious doctrine.

There has been no showing that these Indians could not have brought their claims decades ago. See, *e.g.*, *Cherokee Nation* v. *Southern Kansas Ry.* (1890) 135 U.S. 641. Nevertheless the Oneidas slept on their rights until 1970 without apparent excuse. No other citizen or group in this country would be allowed to assert such stale claims.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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Nos. 83-1965 and 83-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,
Petitioners,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF C. H. ALBRIGHT AND OTHER SOUTH CAROLINA LANDOWNERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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In The

Supreme Court of the United States

October Term, 1983

Nos. 83-1065 and 83-1240

The County of Oneida, New York, and
The County of Madison, New York,
Petitioners,

v.

The Oneida Indian Nation of New York State, *et al.*,
Respondents.

The State of New York,
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The Oneida Indian Nation of New York State, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF C. H. ALBRIGHT AND OTHER SOUTH CAROLINA LANDOWNERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of forty-six private landowners[1] who are named defendants in a lawsuit brought

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[1] The named defendants and successors thereto who have joined in this brief include:

C.H. Albright, Ned M. Albright, David G. Anderson, Mrs. Jessie G. Anderson, John W. Anderson, Jr., John Wesley Anderson, W.R. Ardrey, Jr., Ardrey Farms, Ashe Brick Company, F.S. Barnes, Jr., Bowater Inc., Archie B. Carroll, Jr.,

in 1980 in the District Court of South Carolina by the so-called "Catawba Indian Tribe, Inc." ("the Catawbas").[2] The Catawbas seek to avoid an 1840 transaction[3] between the Catawbas and the State of South Carolina and to be declared the owners of approximately 144,000 acres (225 square miles) of land now inhabited by many thousands of non-Indians. The Catawbas contend that the Trade and Intercourse Act[4] required federal approval or consent to the 1840 Treaty and that such federal approval or consent was lacking. In a manner similar to the *Oneida* case herein, the Catawbas allege that the violation of a single federal statute gives them the right to land which is now held by many thousands of persons who were completely uninvolved in the alleged violation and who relied upon the title of the state of South Carolina in making their purchases.

Celanese Corp., Close Family Real Estate Trust, Duke Power Co., R.A. Fewell, Jane Nisbet Goode, Mrs. Elizabeth Grimball, Mrs. Pauline B. Gunter, Annie F. Harris, T.W. Hotchkiss, Francis M. Mack, Jr., J.E. Marshall, Elizabeth N. Martin, Mary T. McCorkle, W.A. McCorkle, Jr., Nisbet Farms, Inc., W. Oliver Nisbet, W. Olin Nisbet, III, Mary Nisbet Purvis, Roberts N. Rencher, John S. Simpson, Robert T. Simpson, William B. Simpson, Jr., Thomas B. Snodgrass, Jr., Southern Railway, Springland Inc., Springs Mills, Inc., TCU, Inc., TC126 Inc., Tega Cay Recreation Company, Inc., Wachovia Bank and Trust Company, Marshall E. Walker, Eugenia N. White, Hugh M. White, Jr., Robert T. Yoder.

[2] Consent for the filing of this *amicus curiae* brief has been received from the parties. Copies of the consents have been filed with the Court.

[3] The Catawbas allege that they occupied the land in issue "from time immemorial" and that their ownership was recognized and confirmed by treaties with Great Britain in 1760 and 1765. The Catawbas concede that by the 1800's nearly all of the land at issue had been leased to non-Indians. In 1840 the Catawbas transferred any interest they held in the land at issue to the State of South Carolina by the Treaty of Nation Ford, March 15, 1840, the South Carolina Archives, Misc. Records Book N, at 226. Neither the 1760 nor 1765 treaty prohibited the Catawbas from entering into the 1840 Treaty of Nation Ford.

[4] Now codified in part at 25 U.S.C. § 177.

These *amici curiae* have a critical interest in the pending case. The South Carolina landowners face the same threat of losing their land as do the inhabitants of Oneida and Madison Counties.[5] Indeed, the *amici* may be in more immediate jeopardy than the petitioners in this appeal. The Catawbas have not styled their litigation as a "test case" and have not limited the relief sought to damages for a relatively short period of time. They have brought their case in South Carolina as a defendant class action seeking ejectment of thousands of people from land that defendants and their predecessors have owned for at least 140 years. The Catawbas seek to destroy the land titles of these thousands of South Carolina citizens and to recover trespass damages from 1840 to the present time.

The land in issue in the *Catawba* case lies at the northern border of South Carolina in York, Lancaster and, perhaps, Chester Counties. It encompasses the city of Rock Hill, the town of Fort Mill, and a number of smaller communities, and is divided into thousands of separate tracts. The Catawbas' complaint names seventy-six individuals, companies and public entities as defendants and as representatives of an uncertified putative defendant class alleged to consist of more than 27,000 "persons who assert an interest in any portion of the subject lands." Potential class members include thousands of families, stores, warehouses, railroads, farmers, churches, charitable organizations, lending institutions, manufacturers, public utilities, local governments and the state of South Carolina.

The named defendants moved to dismiss the Catawbas' complaint in the District Court on the grounds that a 1959 federal statute commonly referred to as the "Catawba termination act"[6] had profoundly altered the Catawbas' legal status as a tribe able to assert the Trade

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[5] They also face the same counsel. Both the Catawbas and the Oneida Indian Nation of Wisconsin are represented by the Native American Rights Fund.

[6] 25 U.S.C. §§ 931-938.

and Intercourse Act and, as a matter of law, precluded their claim. On June 14, 1982, Senior District Judge Joseph P. Willson, sitting by designation, granted the defendants' motion for summary judgment and dismissed the action.[7] The court held that the Catawba termination act barred the plaintiff's claim under the Trade and Intercourse Act.

On appeal, the Fourth Circuit, in a two-to-one opinion, reversed.[8] The Circuit Court held that the 1959 Act "did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim."[9] In a strong dissent, Circuit Judge Hall found that the 1959 Act terminated the trust relationship between the United States and the Catawbas thereby making it impossible for the plaintiffs to establish a *prima facie* case under the Trade and Intercourse Act and thereby rendering the state statute of limitations applicable.[10] On December 20, 1983 the Fourth Circuit granted the defendants' motion for a rehearing *en banc*. That hearing was held on June 4, 1984.

If the Fourth Circuit does not sustain Judge Willson's interpretation of the Catawba Termination Act and remands the case to the District Court, then the legal issues raised on this appeal would be most relevant in *Catawba*. Thus, whether the Catawbas have a private right of action under Section 177 of the Trade and Intercourse Act; whether statutes of limitation and principles of abandonment and laches apply to the claim; whether Congress has through subsequent conduct ratified the questioned treaty; and, whether a case of this sort raises non-justiciable political questions, could have a direct and

[7] Catawba Indian Tribe v. South Carolina, No. 80-2050 (D.S.C. June 14, 1982).

[8] Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983).

[9] *Id.* at 1300.

[10] *Id.* at 1301-08.

immediate bearing on the ability of many thousands of people to remain on their land.

SUMMARY OF ARGUMENT

Several courts, including the District Court and Court of Appeals in the *Oneida* case, have held that tribal land claims are not barred by the passage of time. However, this view does not find support in the Court's decisions. On the contrary, two lines of cases based on the concepts of abandonment and laches demonstrate that this claim should be barred in accord with a fundamental premise of American jurisprudence that rights become fixed after long periods of time. Abandonment applies because these Indians have long ago given up their right of occupancy to the land in question thereby causing absolute title to vest in the current fee owners. The doctrine of laches applies because the tribes have for many years ignored any right they may have had to sue for recovery of the land.

Any failure of the United States to supervise the 1795 Treaty has been rectified. The Court has held on numerous occasions that the United States can at a later date ratify earlier Indian land conveyances. Such ratification need not be "plain and unambiguous" but can be derived from a variety of sources. Here the subsequent jurisdictional history of the land, the changes in population and actual knowledge of the events by the United States demonstrate ratification.

Finally, these cases are not justiciable since they raise questions that must be decided by the political branches of government. The decision whether to enforce the Trade and Intercourse Act in any given situation was left to the discretion of Congress and the executive branch and that enforcement decision cannot be assumed by the Court. The substantial problems raised by the relief requested well over one hundred years after the alleged statutory violation can now only be weighed and determined by Congress.[11]

[11] These *amici curiae* are also in full agreement with the positions asserted by the Counties of Oneida and Madison in the brief

ARGUMENT

I. THE ONEIDAS' CLAIM SHOULD BE BARRED BECAUSE IT WAS NOT BROUGHT UNTIL 175 YEARS AFTER THE CONVEYANCE AT ISSUE

A. Introduction

The single most striking feature of Eastern Indian land claims is their antiquity. Virtually without exception, they arise out of transactions that occurred generations ago. Thus, they fall within the class of cases that are normally barred by familiar rules concerning the passage of time. Obviously, the Oneidas cannot deny the antiquity of their claims. What is at issue is the applicability of time-related defenses in these cases.

In *Burnett* v. *New York Central Railroad Co.*,[13] the Court stated the reason for barring claims by the passage of time:

> Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. . . ." [14]

The Court has recognized from the earliest time that these concepts are particularly important in the case of land titles:

> The best interests of society require that causes of action should not be deferred an unreasonable time.

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they have filed with the Court. They also contend that the Oneidas do not have a cause of action under federal law, that their claim is barred by the applicable statute of limitations, that actions under the Trade and Intercourse Act of 1793 have abated and that the doctrines of ratification and non-justiciability should be applied as the Counties suggest. These *amici* also support the position asserted by the State of New York concerning the inability of an Indian tribe to assert a right of action under federal common law or pursuant to the Trade and Intercourse Act.

[13] 380 U.S. 424 (1965).

[14] *Id.* at 428, *quoting* Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).

> This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labour is paralyzed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals.[15]

The rights of thousands of landowners to their long-held real property depend upon factual issues respecting which it is impossible to produce live witnesses or direct evidence by reason of the 175 year delay in bringing the Oneida claim.[16] For this reason, the claims such as are asserted by the Oneidas and other tribes should be barred by the passage of time in the same manner as other claims.

While a number of lower courts, including the District Court and the Court of Appeals in this case,[17] have held that such claims are not barred by the passage of time, this view is not supported in the opinions of the Court. On the contrary, two lines of decisions relating to abandonment and laches demonstrate that the Oneidas' claims should be barred by the long delay in their attempted enforcement.

The decisions of the Court relating to abandonment and laches are relevant in the present case for two reasons: (1) they establish that Indians are not exempt from the law of claims by reason of their failure to assert such claims for a long period of time and, therefore, there is no reason to exempt Indians from the appropriate statute

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[15] Lewis v. Marshall, 39 U.S. (5 Pet.) 470, 477-78 (1831). *See also*, Teall v. Schroder, 158 U.S. 172, 179 (1895); Lathrop-ell v. Warren, 67 U.S. (2 Black) 599, 605-06 (1862).

[16] For example, the trial court below relied upon the testimony of an anthropologist to conclude that "no United States commissioner was present . . . when the State purchased [the] land. . . ." Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 535 (N.D.N.Y. 1977) (J.A. 58a).

[17] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 542 (N.D.N.Y. 1977) (J.A. 45a), *aff'd*, 719 F.2d 525, 537-38 (2d Cir. 1983) (J.A. 397a).

of limitations which would have otherwise barred their claim more than 150 years ago;[11] and (2) the doctrines of abandonment and laches, as distinguished from the statute of limitations, may be applied directly in the present case to bar the claim of Oneidas.[12]

B. The Claim of the Oneidas Has Been Abandoned

The doctrine of abandonment is a time-related defense based upon the nature of Indian title. Under decisions of the Court, Indians held a right to occupy and did not hold fee title to their aboriginal lands. In the thirteen original states, the fee to Indian property was in the states and could be transferred, subject to the Indians' right of occupancy. The present-day defendants derive their title from the states and, therefore, the conveyance by the states conveyed the fee title subject to any Indian right of occupancy. This right of occupancy was lost if the Indians no longer occupied the land for a period of time. They were considered to have "abandoned" the land in that situation. Since the Oneidas have been out of possession of the land in issue for at least 175 years, their right of occupancy has been abandoned and the fee interests of the present owners are not burdened by any Indian rights. Significantly, the acquisition of "absolute title" by a fee holder as a result of such abandonment does not require the approval of the United States.

The landmark case of *Johnson* v. *McIntosh*[13] defined the nature of Indian tribes' interest in land as follows:

> [I]ndian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in

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[11] In an effort to avoid repetition, the applicability of state statutes of limitation is not addressed in this Brief. The issue is fully addressed in the brief of Petitioners County of Oneida and County of Madison.

[12] These defenses were asserted in the pleadings in the present case. Abandonment and laches were discussed by the District Court. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 541-42 (N.D.N.Y. 1977) (J.A. 71a-73a).

[13] 21 U.S. (8 Wheat.) 543, 591 (1823).

> the possession of their lands, but to be deemed incapable of transferring the absolute title to others.

In *Fletcher* v. *Peck*,[14] the Court recognized that the thirteen original states held the fee subject to any Indian right of occupancy and this fee could be conveyed by the states. *Fletcher* v. *Peck* involved land located in Georgia which had been transferred by the state prior to the termination of the Indian tribe's right of occupancy. The Court said:

> It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.
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> The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.[15]

In *Johnson* v. *McIntosh*,[16] the Court recognized that the grants of a fee to Indian land "have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."

It has long been recognized by the Court that upon abandonment, the right of possession attaches itself to the fee without further grant. The title of the fee owners is complete without any conveyance that could or would violate the provisions of the Trade and Intercourse Acts. For example, in *United States* v. *Cook*,[17] the Court held

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[14] 10 U.S. (6 Cranch) 87 (1809).

[15] *Id.* at 142-8. In the previous decision in this case, the Court recognized that the fee to the real estate had been in the state of New York. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974).

[16] 21 U.S. (8 Wheat.) 543, 574 (1823).

[17] 86 U.S. (19 Wall.) 591, 593 (1873). *See also* United States v. Fernandez, 35 U.S. (10 Pet.) 303, 304-05 (1836); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

that "[t]he possession, when abandoned by the Indians, attaches itself to the fee without further grant." Thus, even if a cession or transfer would be within the terms of the Trade and Intercourse Acts, there is no prohibition in those Acts against the loss of the right of occupancy by abandonment.

The doctrine of abandonment was applied by the Court in a case that has direct bearing on this and other tribal claims. In *Williams* v. *City of Chicago*,[36] the Indian tribe attempted to recover immensely valuable land which had been physically reclaimed from beneath Lake Michigan. The Court held that the tribe had no interest in the real estate because of the doctrine of abandonment and that the present owners of the fee held it free of the Indian right of occupancy:

> The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. *Johnson* v. *McIntosh*, 8 Wheat. 543. If in any view it ever held possession of the property here in question we know historically that this was abandoned long ago and that for more than a half century it has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.
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> [W]hen this [right of continued occupancy] was abandoned all legal right or interest which both tribe and its members had in the territory came to an end. *Johnson* v. *McIntosh*, 8 Wheat. 543, 594, 595, 599; *Mitchel* v. *United States*, 9 Pet. 711, 745; *United States* v. *Cook*, 19 Wall. 591, 592; *Beecher* v. *Wetherby*, 95 U.S. 517, 525.[37]

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[36] 242 U.S. 434 (1917).

[37] *Id.* at 437. The District Court in Oneida Indian Nation v. County of Oneida, 434 F. Supp. at 541 (J.A. 71a) acknowledged that the Indians' right of occupancy could be lost through abandonment but attempted to distinguish the *Williams* case by stating:

> The small area of land [the Oneidas] now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today.

These purported distinctions have no validity. First, the Oneidas' retention of a small area does not show any intention to retain a huge area that they have not occupied for 180 years. Rather, the move to a smaller area shows an intention to limit the area occupied by the tribe. *See* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 356-58 (1941). Second, as the District Court acknowledged, 434 F. Supp. at 536 (J.A. 60a), the earliest claim by the Oneidas to the land in question was in 1840, and this claim could not be documented. This was approximately the same delay as the half century found significant by the Court in the *Williams* case.

On April 17, 1984 the Court in *Summa Corp.* v. *California*[38] reaffirmed that Indian tribes could lose their right of occupancy through abandonment. The Court cited, quoted and relied upon the cases of *Barker* v. *Harvey*,[39] and *United States* v. *Title Insurance and Trust Co.*[40] Both of those cases involved a 1851 statute which provided for the adjudication of land claims. The statute provided that tribal claims to real estate must be presented before a commission within a period of two years or were to be regarded as abandoned. In *Barker*, the Court held that the tribes' failure to present their claims constituted abandonment.[41] In *Title Insurance and Trust Co.*, the Court reaffirmed *Barker* and approved the lower court's finding that the Indians' claim was "abandoned and lost" and that the contested patent "passed the full title, unencumbered by any right in the Indians."[42]

The very recent reaffirmation of these cases by the Court clearly establishes that an Indian tribe can abandon its claim to the right of occupancy. These Indians manifested an intent to leave the land on numerous occasions, some instances of which had the explicit approval

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[38] 104 S.Ct. 1751, 1757 (1984).

[39] 181 U.S. 481 (1901).

[40] 265 U.S. 472 (1924).

[41] Barker v. Harvey, 181 U.S. at 491-92.

[42] United States v. Title Insurance and Trust Co., 265 U.S. at 482.

of the United States. Further, such abandonment did not require the consent of the United States and was not forbidden by the Trade and Intercourse Acts.[51] In addition, the doctrine of abandonment rests on the sound policy ground of promoting the stability of land titles thereby strongly supporting the defendants in this and other land claim cases.[52]

C. The Claim of the Oneidas is Barred Under The Doctrine Of Laches

The Court has also long held that the federal doctrine of laches is applicable to Indians. The application of laches is not dependent upon any state statute of limitations or rigid deadline. As the Court has stated, laches is based upon fundamental principles of justice:

> The defense [of laches] itself is one which, wisely administered, is of great public utility, in that it

[51] *See* Joint Tribal Council v. Morton, 528 F.2d 370, 380-81 (1st Cir. 1975).

[52] The Court in *Summa Corp.* explained *Title Insurance and Trust Co.* in a manner that shows particular sensitivity to long-established land titles:

> The Court declined an invitation to overrule its decision in *Barker* because of the adverse effect of such a decision on land titles, a result that counseled adherence to a settled interpretation.

104 S.Ct. at 1757, *citing* United States v. Title Insurance and Trust Co., 265 U.S. at 486. The language discussing the rule of abandonment used by the Court in *Title Insurance and Trust Co.* and cited with approval in *Summa Corp.* is also instructive:

> The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results.

265 U.S. at 486. *See also* Arizona v. California, 103 S.Ct. 1382, 1392 (1983).

> prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice . . . . We have had before us lately several cases in which this defense has been presented, and in which the rules determining it have been fully stated and its value clearly demonstrated. *Hamond* v. *Hopkins*, 143 U.S. 224, and cases cited in the opinion; *Felix* v. *Patrick*, 145 U.S. 317; *Foster* v. *Railroad Co.*, 146 U.S. 88; *Johnston* v. *Mining Co.*, 148 U.S. 360. The length of time during which the party neglects the assertion of his rights which must pass in order to show laches varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule.[53]

If the Indians ever had any legal right to prosecute their claim to the land at issue, that claim is now time barred.

The leading case in this Court applying laches to an Indian land claim is *Felix* v. *Patrick*.[54] In that case, the defendant's predecessor in title had obtained script from a half-blood Indian entitling him to purchase land. There was a federal statute expressly providing that "no transfer or conveyance of such script should be valid." The half-blood Indian, Sophia Felix, continued to be a tribal Indian until 1887, when she became a citizen. The land ultimately became a part of the city of Omaha and greatly increased in value. The Court held that the Indian heirs of Sophia Felix who attempted to claim the land were barred by the doctrine of laches:

> In reply to this defense of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until

[53] Halstead v. Grinnan, 152 U.S. 412, 416-17 (1894). For a more recent example of the application of the doctrine of laches, *see* Indep. Bankers Ass'n of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980).

[54] 145 U.S. 317 (1892).

> 1887, tribal Indians, members of the Sioux nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States.
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> But their very analogy to persons under guardianship suggests a limitation to their pupillage, since the utmost term of disability of an infant is but 21 years, and it is very rare that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this.[56]

Thus, the Court indicated that laches would start to run when Sophia Felix was able to sue on her own behalf.[56]

The *Felix* case demonstrates that laches starts to run once the Indians or Indian tribes have access to the courts to enforce their claims. The Court has long recognized the right of tribes to assert any claims they may have to enforce their interests in land.[57] In *Creek Nation* v. *United States*,[58] the Court said:

> The tribes have not yet been dissolved, and they have had, both as a general legal right and by vir-

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[56] 145 U.S. at 330-31. *See also*, Schreiber v. Sharpless, 110 U.S. 76 (1884); Schreiber v. Sharpless, 110 U.S. 347 (1884); Stark v. Starr, 94 U.S. 477 (1876); Schreiber v. Sharpless, 110 U.S. 51 (1884); Schreiber v. Sharpless, 110 U.S. 347 (1884

and that the mortgagee, who was an "innocent" party, could have pleaded laches against a claim by the plaintiff Indians. The present-day defendants in the tribal land claim cases, who have acquired their interest in land in good faith, should also be able to invoke the doctrine of laches.

The district court below demonstrated a fundamental misunderstanding of *Ewert* by stating that "[i]f a transfer of Indian land is void under federal law, see, *e.g.*, 25 U.S.C. § 177, it cannot later be made valid by operation of state law."[40] This statement is clearly not supported by *Ewert* or any other opinion of the Court. Laches may be applied even if the transfer "is void." In *Felix*, for example, the statute expressly provided that the transfers were void yet the Court found the Indians' claims barred by laches.[41] Further, the recognition of laches in *Felix* is altogether independent of any "state law" and can be applied by all courts.

II. THE UNITED STATES RATIFIED THE 1795 CONVEYANCE TO NEW YORK

A major element of proof in a case brought under the Trade and Intercourse Act is to demonstrate the United States never approved or consented to the challenged transfer.[42] At issue in this case is what standard must be applied to determine if the necessary federal scrutiny has ever been given to what was otherwise an appropriate transfer of land in 1795 from the Oneidas to the

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[40] Oneida Indian Nation v. County of Oneida, 434 F. Supp. at 542 (J.A. 75a), *citing Ewert*.

[41] Further, as discussed *supra* pp. 8 to 10, the title of the present owners does not depend upon any transfer of the fee by the Indians. The present land owners hold their fee title independently of any transfer by the Indians.

[42] Epps v. Andrus, 611 F.2d 315, 317 (1st Cir. 1979). *See also*, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Narragansett Tribe v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 802 (D.R.I. 1976) *citing* Joint Tribal Council v. Morton, 528 F.2d 370 (1st Cir. 1975).

state of New York. The Second Circuit, citing language in *United States* v. *Santa Fe Pacific Railroad*,[43] held below that for such ratification to be found it must be shown to have been "plain and unambiguous."[44] The Second Circuit misapplied *Santa Fe* and understated the variety of ways in which the Court has found the necessary congressional ratification of transactions with Indian tribes.

There are no artificial requirements concerning the time and manner of congressional consent to Indian land transfers. Consent can be found not only in "plain and unambiguous" federal action contemporaneous with the transfer, but also in legislation preceding and authorizing the transfer;[45] in a general act, the circumstances of whose enactment demonstrate consent;[46] or in a statute enacted many years after the transfer which recognizes the occurance or effect of the transfer.[47] Moreover, congressional ratification of a disputed transfer of Indian land need not be explicit.[48] It is well established that later congressional action confirming the effect of a disputed transfer or mere congressional acquiescence in the transfer can constitute ratification.[49]

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[43] 314 U.S. 339, 354 (1941).

[44] Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 539 (2d Cir. 1983) (J.A. 236a).

[45] *E.g.*, United States v. National Gypsum Co., 141 F.2d 883, 883 (2d Cir. 1944).

[46] *E.g.*, Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735; Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716.

[47] *See, e.g.*, Seneca Nation v. United States, 173 Ct. Cl. 912 (1965). *See also*, Buffalo, Rochester & Pittsburg R.R. Co. v. Lavery, 27 N.Y.S. 443 (App. Div. 1894), *aff'd on opinion below*, 149 N.Y. 576, 43 N.E. 986 (1896).

[48] *See* Seneca Nation v. United States, 173 Ct. Cl. 912, 915 (1965). *See also* Seneca Nation v. Christy, 126 N.Y. 122, 146, 27 N.E. 275, 282 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896).

[49] Joint Tribal Council v. Morton, 528 F.2d 370, 380-81 (1st Cir. 1975).

Ascertainment of consent can include examining the conduct of the federal government over the years. For example, in *Shoshone Tribe* v. *United States*,[87] Justice Cardozo looked to a course of governmental conduct as retroactively validating the occupancy by the Arapaho Indians of a portion of the Shoshone reservation. This occupancy had occurred over a number of years with the acquiescence of the United States. What was at issue in *Shoshone* was the proper valuation date to apply to the "tortious" taking of the Shoshone lands by the placement of the Arapahoes on their reservation. The choices included 1878, the date when the Arapahoes first came on the land; 1891, the date when the Commissioner of Indian Affairs made a public statement in support of the Arapaho occupation; and 1927, the date when Congress passed a jurisdictional act. The Court held that by relation back, 1878 was the taking date:

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States *through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong*, adopting the *de facto* appropriation by relation as of the date of its beginning.[88]

In recent years there has been a clear trend by the Court toward finding the loss of an Indian tribe's interest in reservation land from the "surrounding circumstances" and legislative history.[89] For example, in *Rose-*

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[87] 320 U.S. 476 (1937).

[88] *Id.* at 496 (emphasis supplied). *See also*, United States v. Northern Paiute Nation, 490 F.2d 954, 960 (Ct. Cl. 1974).

[89] Mattz v. Arnett, 412 U.S. 481, 505 (1973). *Accord*, Solem v. Bartlett, 104 S.Ct. 1161 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

bud Sioux Tribe v. *Kneip*,[90] the Court considered the effect of three Acts of Congress that opened for settlement various parts of a reservation which had originally been established by treaty in 1894. The Court held that the "mere fact" that a reservation had been opened to settlement does not necessarily mean that the opened area lost its reservation status; "the *fact* of the Act," the "surrounding circumstances," and the "legislative history," all can "clearly evidence congressional intent to diminish the boundaries of the . . . Reservation."[91] In reaching its conclusion, the Court considered the "jurisdictional history" of the land at issue subsequent to the events complained of; that is, the extent to which various state and federal authorities treated the land as being outside of the reservation:

> [T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands . . . since the passage of the 1904 Act . . . .[92]

In a case decided this term, *Solem* v. *Bartlett*,[93] the Court stated that what subsequently takes place on the land is most useful in ascertaining the requisite intent to disestablish a reservation:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian

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[90] 430 U.S. 584 (1977).

[91] *Id.* at 587. *See also*, DeCoteau v. District County Court, 420 U.S. 425, 445 (1975).

[92] 430 U.S. at 688. Conversely, the Court also found that the fact that neither Congress nor the executive sought to exercise authority over the land was "entitled to weight as a part of the jurisdictional history." *Id.* at 604.

[93] 104 S.Ct. 1161 (1984).

> character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. [citations omitted]. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened land: as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.[20]

The *Rosebud* and *Solem* cases are particularly instructive here. The history of the Oneida Indian reservation from the time of the 1795 treaty up to the final treaty in 1846 demonstrates a pattern of turning over Indian land to state control which has been consistent since the time of the treaty. The population of the entire area has clearly taken on a non-Indian character and the federal government has not objected to the presence of its current inhabitants. There is no evidence that the federal government has ever formally challenged New York's authority over this land.

The fact that the United States knowingly allowed the land in question to remain in the possession of the successors-in-interest to the state of New York is itself proof that the requirements of the Trade and Intercourse Act have been met. In *United States* v. *Creek Nation*,[21] a portion of land in which the Indian tribe claimed an interest had been patented to various settlers. The Court held that a compensable taking had occurred, the United States having disposed of the land by the issuance of patents to non-Indians. In so holding, the Court found that the taking had occurred when the United States, with knowledge of the facts, confirmed the issuance of the patents by permitting them to stand uncancelled:

> Plainly the United States would have been entitled to a cancellation of the dispossals had it instituted

[20] *Id.* at 1167 (emphasis added) (citations omitted).

[21] 295 U.S. 103 (1935).

> suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the dispossals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. *In this way the United States in effect confirmed the dispossals* . . . .[22]

The above language speaks directly to the major factual elements of this case. The United States could have sued or taken other action to render the 1795 transaction with the state a nullity and thereby to maintain the Indians' right of occupancy.[23] It is quite clear here that the United States was specifically afforded "full knowledge of the facts" and took no legal steps to set aside the transfer. The District Court found below that in 1795 Secretary of War Pickering ordered the local Indian Superintendent, Israel Chapin, *Jr.*, to speak to the Oneidas to convince them not to enter into the disputed sale. Chapin made contact with the Indians and informed them of the government's opposition to the sale. According to the District Court, "Chapin was [then] instructed to leave matters as they stood." The sale was concluded shortly thereafter.[24] It should also be emphasized that the challenged sale was not an isolated example of an obscure transfer of a small parcel of land affecting a handful of current land owners.[25] The land in question was transferred as one of a series of treaties that took

[22] 295 U.S. at 110 (emphasis added).

[23] Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) ("The obvious purpose of [§ 177] is to . . . enable the Government acting as parens patriae for the Indians, to vacate any dispositions of their lands made without its consent."). *See also*, United States v. Sandoval, 231 U.S. 28, 46-48 (1913).

[24] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 534-35 (N.D.N.Y. 1977) (J.A. 54a-55a).

[25] Disestablishment has been found to occur in situations involving two parcels in a relatively small reservation. *See* Parkinson Band v. Kane Realty, Inc., 680 F.2d 71 (9th Cir. 1982), cert. denied, 103 S.Ct. 817 (1983).

place over a period from 1795-1846.[40] Both Congress and the executive branch had knowledge of the Oneidas' transaction with New York from the time of their very occurrence.[41] As in *Cook Nation*, the United States "permitted the disposals to stand," allowed the state and its successors in interest to remain in possession of the land and thereby confirmed the entire 1795 transaction.[42]

The lower court's simplistic reliance upon a misapplied phrase in *Santa Fe* should be reversed.[43] While the

[40] The Indian Claims Commission has held that the United States "had constructive knowledge of all of the 33 treaties, and probably had actual knowledge of most of them." Oneida Indian Nation v. United States, 43 Ind. Cl. Comm. 213, 218 (1978). The Indian Claims Commission also found that the federal government was specifically informed of the very cession that is the subject of this litigation. *Id.* at 218.

[41] The Second Circuit has itself acknowledged that the United States made subsequent references to the 1795 treaty with the State in its treaty with the Oneidas of June 1, 1798. Oneida Indian Nation v. County of Oneida, 719 F.2d at 529 (J.A. 250a-56a). The Second Circuit's comment that "[t]here is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale" begs the question. *Id.* at 539-40 (J.A. 297a). The only "claim of illegality" was the lack of consent. Otherwise the transaction was perfectly legal. The federal recognition and implied validation of the immediately prior transaction was all that was necessary to eliminate any problem with the 1795 transaction.

[42] *See also*, Confederated Salish and Kootenai Tribes v. United States, 435 F.2d 700, 707-08 (Ct. Cl. 1969), *cert. denied*, 402 U.S. 1015 (1969). *Cook Nation* and *Salish* make it clear that the plaintiffs are left, at most, only with a claim against the United States for a wrongful taking. *See generally*, Arizona v. California, 103 S.Ct. 1382, 1393 n. 20 (1983). Such a right was, in fact, provided by the Indian Claims Commission Act and the Oneidas themselves withdrew from taking advantage of that means of recovery.

[43] United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941) was not concerned with the validation of a transaction in the manner employed in this case. The issue in *Santa Fe* was whether the policy concerning Indian rights in aboriginal land applied to tribes within the Mexican cession. The Court held that a finding that the policy would not apply requires "plain and unambiguous action" by Congress. *Id.* at 346.

Court shows concern for the protection of reasonable tribal interests, it has also demonstrated the need "to see the facts in true perspective [and to] . . . view them in their totality and not in isolation."[44] The Court continues to apply serious historical analysis in these cases and has taken into account the "justifiable exceptions" of current-day land owners in forming its conclusions.[45] The defendants in this and in other Indian land claim cases are surely justified in believing that their titles could not be attacked on the basis of such ancient history and in the face of Congress' clear knowledge of the status of their land.

III. THE ONEIDAS' CLAIM PRESENTS SOLELY A NON-JUSTICIABLE POLITICAL QUESTION

The Trade and Intercourse Act was an attempt by Congress to assert a preeminent role over the conduct of Indian affairs and to express a federal presence in transactions between states and Indian tribes.[46] Although Congress recognized that the Indians had the right to release their right of occupancy to the original thirteen States, it found within the Constitution the right to exercise political authority over such transactions. As noted above, although the executive branch, which was Congress' delegate in these matters, had specific knowledge of the 1795 Treaty and made some attempt to discourage its conclusion, it never enforced the Trade and Intercourse Act so as to set aside the conveyance.[47] This decision not to implement the Trade and Intercourse Act was inherently political, was not subject to the review of

[44] Rhodeen Tribe v. United States, 399 U.S. 478, 495 (1957).

[45] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977). *Cf.* Solem v. Bartlett, 104 S.Ct. 1161, 1171 (1984) (Fact that few homesteaders moved onto the land is a factor in showing reservation not diminished).

[46] *See* Mohegan Tribe v. Connecticut, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

[47] *Supra* pp. 20 to 22.

any court and could not be legally challenged by the Indians. As an exercise of Congress' primary power over Indian affairs it is not reviewable.

The Court continues to recognize Congress' "paramount power over the property of the Indians."[28] This power is derived "by virtue of [Congress'] superior position over the tribes."[29] Congress has the ability to eliminate reservations or to reduce their boundaries without tribal consent or without payment of compensation.[30] The same power resides in Congress to establish reservations.[31] Here the Indians seek to have the Court impose its power to reestablish a reservation in an area that has been bereft of such a presence for almost 175 years. In so doing, they ask for the most extraordinary form of relief that may have ever been requested of the Court. They seek the ultimate reestablishment of Indian sovereignty over vast populated sections of the United States and the ejectment of tens of thousands of truly innocent people from their homes and businesses.[32] These landowners, who paid for their lands in good faith and without knowledge of any latent Indian land claims, stand to forfeit their land "without just compensation."

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[28] United States v. Sioux Nation, 448 U.S. 371, 408 (1980), quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[29] Morton v. Mancari, 417 U.S. 535, 551-52 (1974). *See also*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955).

[30] United States v. Sioux Nation, 448 U.S. 371, 383, 383 n. 14 (1980); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 566, 568 (1903). *Cf.* United States v. Creek Nation, 295 U.S. 103 (1935) (compensation dependent upon special congressional act).

[31] *See*, United States v. Midwest Oil Co., 236 U.S. 459, 469-70 (1915).

[32] The establishment of Indian tribal sovereignty over a particular tract of land has obvious political ramifications. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 630-31 (1977) (Marshall, J., dissenting).

Judicial action of the type sought by the Tribes is inappropriate since it assumes rights that the Constitution has reserved for Congress.[33] While in recent years the Court has taken steps to define in clearer terms the applicability of the "political question" doctrine in Indian litigation, it has not eliminated its applicability in cases such as this.[34]

Thus, in *United States* v. *Sioux Nation*,[35] the Court acknowledged that the "Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie treaty." What was viewed in *Sioux Nation* as justiciable was the *standard* under which Congress was obligated to *compensate* the Indians for the taking once the taking had, in fact, occurred.[36] The actual fact of taking the land was held to be within the sole jurisdiction of Congress. Indeed, in *Sioux Nation* the Court made specific reference to a critical and still valid element of *Lone Wolf*:

> The *Lone Wolf* Court, therefore, was not required to consider the contentions of the Indians that the agreement ceding their lands had been obtained by fraud, and had not been signed by the requisite number of adult males. "[A]ll these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts."[37]

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[33] Morton v. Mancari, 417 U.S. 535, 551-52 (1974). *See generally*, Baker v. Carr, 369 U.S. 186, 215-17 (1962).

[34] *See generally*, Gilligan v. Morgan, 413 U.S. 1, 11 (1973) ("because [the political question] doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise").

[35] 448 U.S. 371, 413-14 n. 28 (1980).

[36] 448 U.S. at 411 n. 27.

[37] 448 U.S. at 411, quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903). *See also*, Solem v. Bartlett, 104 S.Ct. 1161, 1166 n. 11 (1984) ("At one time, it was thought that Indian consent was

Thus the Court distinguished *Lone Wolf* in its consideration of the political question doctrine on the fact that in *Sioux Nation*, Congress provided a judicial remedy for redress of a moral wrong, and it was only the post-conveyance means of payment that was at issue:

> Fourth, and following up on the political question holding, the *Lone Wolf* opinion suggests that where the exercise of congressional power results in injury to Indian rights, "relief must be sought by an appeal to that body for redress and not to the courts." Unlike *Lone Wolf*, this case is one in which the Sioux have sought redress from Congress, and the Legislative Branch has responded by referring the matter to the courts for resolution . . . . Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply Lone Wolf's principles of deference. *See* United States v. Tillamooks, 329 U.S. 40, 46 (1946) (plurality opinion).[25]

As for the New York Indians, Congress specifically provided a remedy for any violation of the Trade and Intercourse Act by granting access to the Indian Claims Commission, a vehicle that these plaintiffs, until recently, have effectively employed.[26]

That the Court should defer to the political branches is also apparent from the very nature of this case and other lawsuits that will be directly impacted by the Court's opinion. Judge Meskill, in his dissent below, characterized the result reached by the majority as:

> a novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.[27]

In contrast with the judiciary, the political branches are particularly well-suited to resolve the issues now before the Court. Just as those departments make discretionary decisions about whether to condemn land for public use or whether to provide disaster relief, they can redress age-old claims of injuries, some technical and some egregious, where alleged present-day violators are individually innocent of any wrongdoing. They can weigh the hardships that should and can be borne by diverse segments of our society; they are able to compromise these claims if appropriate. The political branches—if they conclude that the Indian claimants should receive redress—are able to allocate the costs of that relief to society in general.[28] The Oneidas concede as much in their brief opposing the petition for certiorari:

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needed to diminish a reservation, but in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), this Court decided that Congress could diminish reservations unilaterally.").

[25] Sioux Nation, 448 U.S. at 414. The Court also was clear that the justiciability principles of *Sioux Nation* are applicable only to takings of land where the Indians have "recognized title." *Id.* at 415 n. 29, *citing* Two-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). In Oneida and other such land claims there has been no suggestion that the land at issue was recognized title land. Thus, the clear import of the Court's view of its *Sioux Nation* decision is that Congress has an uncontroverted right to dispose of such aboriginal land as it sees fit. *See also*, United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) ("The manner, method and time of such extinguishment [of aboriginal Indian title] raise political, not justiciable, issues."); Boucher v. Wetherby, 98 U.S. 517, 525 (1877) ("[A]ction towards the Indians with respect to their lands is a question of governmental policy . . . .").

[26] *See also*, Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977). In that case the Court was careful to preserve areas of Indian affairs that are clearly within Congress' sole prerogative, most specifically under its facts, the power to abrogate. Unlike *Delaware Tribal Bus. Comm.*, we are not concerned with evaluating in either due process or equal protection terms the means chosen by Congress to implement a decision affecting Indian land. The question before the Court is Congress' decision long ago not to return the land at issue to Indian sovereignty.

[27] 719 F.2d at 549 (J.A. 258a).

[28] It is important to emphasize that the Oneida's claims have been presented to, and decided by, the political branches. The

> [I]t is clear that these claims can best be finally resolved through an equitable settlement implemented by an act of Congress. In consultation with the parties, the Congress can better weigh and make a fair adjustment of competing equities than a court of law."

The Court should follow the Oneidas' own suggestion and remit this case to its proper venue.

CONCLUSION

The Indians in this and other land claim cases are attempting to state causes of action for ancient wrongs. They seek relief from thousands of innocent people who purchased their property without any knowledge of the failure to conform with a single federal statute. As stated in a recent Indian land claim decision:

> The Court believes that a great injustice was probably done to some of the [Indians] . . . , an injustice all too typical of the general treatment of those American natives upon whom the white man chose to impose a conqueror's terms. Justice would not be served, however, by wresting those lands away, more than a century later, from equally innocent landowners. To exact retribution on the current landowners for the sins of their great-grandfathers would merely add to injustice, not right it.[98]

Oneidas presented their case at least twice to the President shortly before filing this suit; the President and his "superintendent" made their considered decision to limit government action to the Indian Claims Commission. The Second Circuit's conclusion is thus inconsistent with the view of the executive branch. Ironically, the Oneidas were awarded relief in 1978 by the Indian Claims Commission but then withdrew their claim after their success. *See* Oneida Indian Nation v. United States, 43 Ind.Cl.Comm. 373 (1978).

[97] Brief of Oneida Indian Tribe in Opposition to Petition for Writ of Certiorari, p. 20.

[98] Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611, 626 (D. Kan. 1981), *aff'd*, 724 F.2d 969 (10th Cir. 1984).

The judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the Counties, should be reversed.

Respectfully submitted,

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AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, *et al.*,
Petitioners,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE

in Support of the Counties of Oneida and Madison, Petitioners in No. 83-1065 and Respondents in No. 83-1240

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INTEREST OF THE AMICI'S CURIAE

The American Land Title Association is the national trade association of the land title industry. The Association has approximately 2,000 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The interest of the American Land Title Association in this case arises because of the interest of the Association and its members in the certainty and predictability of the laws affecting titles to and rights in real estate. This Court has long recognized the importance of stability in real estate titles. *See, e.g., Nevada v. United States*, —— U.S. ——, 77 L. Ed. 2d 509, 524 n.10 (1983) (quoting *Minnesota Co. v. National Co.*, 70 U.S. (3 Wall.) 332, 334 (1865)); *Arizona v. California*, —— U.S. ——, 75 L. Ed. 2d 318, 334 (1983); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924).

This case threatens the stability of titles to real estate like few cases that have come before. The threat extends not only to the 100,000 acres of land in New York acquired from the Oneidas in 1795 in the transaction that is the subject of this litigation, but also to additional land in New York and in other states that was acquired from Indian tribes in similar situations. The statement of the case by petitioners the County of Oneida and the County of Madison (hereinafter "Counties") describes the nature of the claim asserted by respondents Oneida Indian Nation of New York, Oneida Indian Nation of Wisconsin, and Oneida of the Thames Band Council (hereinafter "Oneidas"). The gravamen of the claim asserted by the Oneidas is that the purchase in 1795 of 100,000 acres of land from the Oneida Nation by the State of New York is void because there was no federal participation in the transaction as allegedly

required by section 8 of the Trade and Intercourse Act of 1793.[1]

Because of this alleged lack of federal participation, the Oneidas maintain, and the courts below held, that all subsequent transfers of the 100,000 acres acquired by New York in 1795 are also void. Defenses based on statutes of limitations, laches, adverse possession, and the good faith of innocent purchasers were ruled inapplicable as a matter of law. 434 F. Supp. at 541-44, Jt. App. at 71a-76a. In the view of the courts below, the Oneidas have a present right to possess the 100,000 acres of land that their ancestors last possessed in 1795, despite the intervening two centuries of good faith occupation and development of the 100,000 acre tract by thousands of landholders.

As indicated above, the threat to the stability of real estate titles presented by the ruling in this case extends beyond the 100,000 acres acquired from the Oneidas in 1795. New York acquired an additional 150,000 acres of land from the Oneidas in roughly 25 transactions between 1800 and 1848. The Oneidas allege that these transactions are likewise void because of a lack of federal participation, and assert a present right to possess the land involved.[2] New York acquired land from other

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[1] Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329.

[2] *See Oneida Indian Nation v. County of Oneida*, Civ. No. 74-CV-187 (N.D.N.Y. filed May 3, 1974) (action for damages challenging approximately 25 transactions with New York); *Oneida Indian Nation v. Williams*, Civ. No. 74-CV-167 (N.D.N.Y. filed 1974) (action for ejectment against 23 landowners).

The Oneidas have also filed suit seeking to be restored to possession of approximately 5,750,000 acres of land acquired by New York in two transactions in 1785 and 1788, alleging that those two acquisitions violated the Articles of Confederation because they were made without the participation of the confederal government and therefore were void. *See Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982). The suit challenging the 1785 and 1788 acquisitions poses many of the same issues that are raised by this case.

Indian tribes during the period from 1785 to approximately 1840, and those tribes similarly assert that the transactions are void and therefore that the tribes have a present right to possess the land.[3]

Nor is the impact of this case limited to the State of New York. Claims similar to those asserted by the Oneidas are pending or threatened in Connecticut, Louisiana, Massachusetts, South Carolina, Texas, and elsewhere.[4]

One factor that remains constant with respect to all of the claims is that the current landholders are innocent, good faith occupants of the land now being claimed by Indian tribes. Whatever wrongs may have been perpetrated on Indian groups generations ago were done without the knowledge or participation of the thousands of private landowners who possess the land today. Irrespective of the arguments, legal or equitable, that Indian groups such as the Oneidas can marshal to show that New York should not have acquired their land in

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[3] *See, e.g., Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297 (N.D.N.Y. 1983); *Canadian St. Regis Band of Mohawk Indians v. New York*, 97 F.R.D. 453 (N.D.N.Y. 1983).

[4] *See Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), *petition for rehearing en banc granted* (Dec. 20, 1983); *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Schaghticoke Tribe v. Kent School Corp., Inc.*, 423 F. Supp. 780 (D. Conn. 1976); *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, No. 74-6826-MCN (D. Mass. filed 1974); *Christiantown Tribe v. Watt*, No. 81-3206-S (D. Mass. filed Dec. 18, 1981); *Chappaquiddick Tribe v. Watt*, No. 81-3207-S (D. Mass. filed Dec. 18, 1981); *Herring Pond Tribe v. Watt*, No. 81-3208-S (D. Mass. filed Dec. 18, 1981); *Troy Tribe v. Watt*, No. 81-3209-S (D. Mass. filed Dec. 18, 1981); *see also* Statute of Limitations Claims List, 48 Fed. Reg. 51204, 51252 (Nov. 7, 1983); 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983) (Department of the Interior listing of potential Indian land claims in the "Eastern Area"); *cf. Alabama Coushatta Tribe of Texas v. United States*, Cong. Ref. No. 3-83 (U.S. Claims Ct.) (claiming tribe possesses unextinguished aboriginal title to 17 counties in Texas).

1795, it would be an unprecedented miscarriage of justice for this Court to render a decision that would mean that thousands of current landholders have no right to possess their homes, farms and businesses because the federal government did not participate sufficiently in the acquisition of Indian land almost two centuries ago.

SUMMARY OF ARGUMENT

The Counties advance four arguments why the Oneida claim should not prevail: (1) the United States subsequently ratified and therefore validated the 1795 acquisition by New York, (2) the Oneidas do not have a cause of action against the counties under federal law, (3) the Oneida claim is barred because it was not brought until 175 years after the conveyance at issue, and (4) the Oneida claim presents nonjusticiable political questions. The American Land Title Association endorses these arguments and joins in them. The Association addresses the first three of these arguments in its brief.

The arguments advanced by the Counties all share a common theme. It was, and is, the responsibility of the executive and legislative branches of the federal government to address the fundamental issues raised by the Oneida claim. It was the responsibility of Congress and the executive branch in 1795 to determine whether New York's acquisition of land from the Oneidas contravened federal policy and, if it did, to take whatever steps were advisable to make New York comply with that federal policy. It is the responsibility of Congress and the executive branch today to determine what remedial action, if any, should be taken at this late date with respect to what occurred 190 years ago. Indian tribes or private parties should not be allowed to usurp this federal governmental responsibility through lawsuits against current landholders.

ARGUMENT

I. The United States Ratified the 1795 Acquisition of Oneida Land By the State of New York.

The courts below ruled not only that New York acquired the Oneidas' land without obtaining the approval of the federal government in 1795, but also that the federal government has never subsequently approved the acquisition. *See* 719 F.2d at 539, Jt. App. at 235a-37a; 434 F. Supp. at 538-40, Jt. App. at 64a-67a. The courts below appeared to view the 1795 acquisition as if it involved only a small parcel of land that could easily and understandably be overlooked by the federal government for 190 years.[8] The 1795 acquisition, of course, did not involve a parcel that could so easily be overlooked. It involved 100,000 acres (roughly 150 square miles) that comprised 40 percent of the Oneidas' then-existing res-

[8] In rejecting the Counties' argument that the United States ratified the 1795 acquisition by its approval of acquisitions by New York in 1798 and 1802 that referred to the 1795 acquisition, the Court of Appeals stated there was no evidence that in 1798 and 1802 "the federal authorities were then aware of any claim of illegality of the prior land sale." 719 F.2d at 539-40, Jt. App. at 237a. Earlier in its opinion, however, the Court noted that in 1795 "the federal authorities repeatedly urged New York State Governor Clinton and his successor Governor John Jay to seek and secure the appointment of federal commissioners before the State negotiated any purchase of Indian lands." 719 F.2d at 529, Jt. App. at 212a, and indeed the Indian Claims Commission decision upholding the Oneidas' breach of fiduciary duty claim against the United States with respect to the 1795 acquisition determined that the federal government knew of that acquisition at the time it was made and described a barrage of correspondence involving the President, the Attorney General, the Secretary of War, the federal Indian agent for New York, and Governor Jay attempting to stop New York from proceeding with the 1795 acquisition unless a federal commissioner were present. *See Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 379-84 (1978). Clearly, in addition to their other failings, the federal authorities were cursed with short memories, since, according to the Court of Appeals, by 1798 they had forgotten the transaction they had supposedly so vigorously opposed in 1795.

ervation. Moreover, the 1795 transaction was but one of a series of transactions by which New York acquired 250,000 acres of land from the Oneidas after 1790.

It is preposterous to suggest that the federal government somehow overlooked for 190 years a transfer involving 150 square miles in New York. It is even more preposterous to suggest that the United States withheld its approval of that transfer for 190 years while permitting the State of New York and countless thousands of innocent individuals to act on a mistaken belief concerning the ownership of the land. Neither of these suggestions is tenable. The truth of the matter is that the United States ratified New York's 1795 acquisition of Oneida land. This is the only satisfactory explanation of the United States' course of conduct since 1795.[6]

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[6] It may well be that the ratification of the 1795 acquisition by the United States constituted a breach of its fiduciary duty to the Oneidas. The Oneidas brought an action for breach of fiduciary duty against the United States before the Indian Claims Commission with respect to the 1795 acquisition as well as the other acquisitions by the State of New York, and prevailed. *See United States v. Oneida Indian Nation of New York*, 477 F.2d 939 (Ct. Cl. 1973), *on remand*, 43 Ind. Cl. Comm. 373 (1978) (United States breached its fiduciary duty to Oneidas by failing to protect them in land sales to New York). Before the Indian Claims Commission could determine the recovery to which the Oneidas were entitled because of this breach of fiduciary duty, the Oneidas elected to dismiss their claim. The Oneidas' decision to renounce their claim, of course, does not negate the fact that Congress did provide them with a remedy. Indeed, courts have held that Congress intended the Indian Claims Commission to be the exclusive remedy for ancient Indian land claims. *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Navajo Tribe of Indians v. New Mexico*, Civ. No. 82-1148-JB (D. New Mex. Jan. 23, 1984), *appeal pending; see also Six Nations Confederacy v. Andrus*, 610 F.2d 996, 998 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) ("Because Congress enacted a special and exclusive system for determination of claims under the Indian Claims Commission Act, appellant could not choose for itself another avenue of relief. Congress had selected the route that had to be followed."); *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994, 997-99 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979) ("There can be no doubt that Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all.")

It is clear that the United States can subsequently ratify transfers governed by the land transfer provisions of the trade and intercourse acts. Indeed, courts have held that the United States has done so with respect to a number of Indian land transfers in New York. *See United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944); *Seneca Nation v. United States*, 173 Ct. Cl. 912 (1965); *Seneca Nation v. Christy*, 126 N.Y. 122, 27 N.E. 275 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896); *Buffalo, Rochester & Pittsburgh Railway Co. v. Lavery*, 82 Sup. Ct. 396, 27 N.Y.S. 443 (App. Div. 1894), *aff'd on opinion below*, 149 N.Y. 576 (1896). For example, in *Seneca Nation v. United States*, 173 Ct. Cl. 912 (1965), the Senecas sued the United States under the Indian Claims Commission Act alleging that the United States failed to bring an action against the State of New York to recover land that was taken by New York without federal approval and therefore in violation of the Trade and Intercourse Act. The Court of Claims determined that the Senecas were not entitled to recover from the United States because the United States had approved the 1858 transfer:

> [I]f federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant would have no complaint if assent had been given at the time of the appropriations. *But approval can also come afterwards*, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except "that this Act shall be inapplicable to lands formerly in the Oil Spring

> Reservation and heretofore acquired by the State of New York by condemnation proceedings." *This explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation, as well as of the state's continued claim of right.*

173 Ct. Cl. at 915 (emphasis added).

Similarly, in *United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944), the United States Court of Appeals for the Second Circuit considered an action brought by the United States on behalf of an Indian tribe to void two leases on the ground that the leases were made without federal approval in violation of the land transfer provision of the Trade and Intercourse Act. The Second Circuit ruled that the federal government had implicitly approved the leases. As Judge Augustus Hand explained:

> For many years it has been the *understanding* of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that *a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.*

Id. at 863 (emphasis added).

In other contexts involving Indian tribes, courts have held that subsequent conduct by the United States can validate an action illegal at the time it was committed. *See, e.g., Shoshone Tribe v. United States*, 299 U.S. 476

(1937); *United States v. Creek Nation*, 295 U.S. 103 (1935); *United States v. Northern Paiute Nation*, 490 F.2d 954 (Ct. Cl. 1974). For example, in *Shoshone Tribe* the United States settled the Northern Arapaho Tribe on the Shoshone reservation despite a treaty providing that the Shoshone reservation would be "set apart for the absolute and undisputed use and occupation of the Shoshone Indians." 299 U.S. at 485-86. Notwithstanding repeated protests by the Shoshones, the United States continued to maintain the Arapahoes on the Shoshone reservation, and in time regarded the Arapahoes as co-owners of the Shoshone reservation. *Id.* at 488-90. Ultimately the Shoshones sued for compensation. In fixing the date when the United States acquired the portion of the Shoshone reservation given to the Arapahoes, this Court determined that, because the United States had ratified the wrong, the date of taking occurred at the time of the original illegal entry.

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States *through the action and inaction of its executive and legislative departments for half a century has ratified the wrong, adopting the de facto appropriation by relation as of the date of its beginning.*

299 U.S. at 495 (emphasis added).

The principles developed in these cases make it clear that the federal government can subsequently ratify and approve a transfer of Indian land to which the land transfer provision of the Trade and Intercourse Act applies, and in fact the United States has ratified and approved the 1795 acquisition of the Oneida lands by the State of New York. The 1795 and 1802 acquisitions by New York, which were explicitly approved by the United States, referred to the 1795 acquisition as an accom-

plished fact. The agreement concerning the 1795 acquisition of Oneida land by New York provided in part:

> The said [Oneida] Indians do cede release and quit claim to the People of the State of New York, forever, All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of the Lot No. 54, in the last purchase from them running northerly to a button wood tree . . . .

Jt. App. at 36a (emphasis added). The phrase "last purchase from them" refers to the 1795 acquisition, and "lot No. 54" was clearly included within the 1795 acquisition. A United States commissioner was present at the signing of the 1795 agreement and Congress ratified the 1795 agreement on February 13, 1795.

On June 4, 1802, New York and the Oneida Nation entered into another agreement for the acquisition of Oneida lands. The 1802 agreement provided in part:

> All that certain Tract of Land, beginning at the Southwest corner of the Land lying along the Genesee road . . . thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to *other lands heretofore ceded* by the said Oneida Nation of Indians, to the people of the State of New York then along the same westerly, to a part of said last mentioned Land, called the Two-mile strip and thence along the same, northerly to the place of Beginning.

Jt. App. at 38a-39a (emphasis added). Again, the phrase "other lands heretofore ceded" refers to the land acquired from the Oneidas by New York in 1795. A United States commissioner was also present at the signing of the 1802 agreement and Congress ratified the agreement on December 31, 1802.

Apart from the approval of the 1795 acquisition given through the 1795 and 1802 agreements, the "action and inaction of [the] legislative and executive departments" for 190 years demonstrates that the United States has approved the 1795 acquisition.[7] It is simply too late in the day to pretend after 190 years of federal action to the contrary that the United States has withheld its approval of the 1795 acquisition and intended the Oneidas to retain the right to possess this land.

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[7] The United States has taken numerous actions that are inconsistent with any supposed recognition on its part of ownership rights by the Oneidas in the 100,000 acre tract. For example, Interstate 90, a federally assisted highway, traverses the tract. Presumably the United States has filed and enforced federal tax liens against real property owned by persons other than the Oneidas located within the tract, and the Federal Housing Administration and the Veterans Administration have made loans secured by property located within the tract. Such conduct is inconsistent with any federal recognition of the rights asserted by the Oneidas. It is also beyond dispute that the federal government was well aware of the circumstances of New York's acquisition of the Oneidas' lands, both at the time the acquisition occurred, *see Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 379-84 (1978), and subsequently. *See* Letter from Oscar L. Chapman, Under Secretary of the Interior, to Senator Hugh Butler, Chairman, Committee on Interior and Insular Affairs (March 1, 1948), *reprinted in* S. Rep. No. 1137, 80th Cong., 2d Sess. 4-5 (1948); Letter from Ray L. Wilbur, Secretary of the Interior, to Senator Lynn J. Frazier, Chairman, Committee on Indian Affairs (October 12, 1929), *reprinted in* Hearings on H.R. 9720 Before the House Comm. on Indian Affairs, 71st Cong., 2d Sess. 189 (1930) ("In some instances such transactions [between New York and Indian tribes] were had with the sanction of the Federal Government and in others without such sanction other than such as might be implied. That is, as to those transactions between the Indians and the State not expressly sanctioned, no protest or opposition thereto has ever been raised, at least in so far as the legislative and executive branches of the Federal Government are concerned."); Report by John R. T. Reeves to the Commissioner of Indian Affairs, Dec. 26, 1914, *reprinted in* H.R. Doc. No. 1590, 63d Cong., 3d Sess. 14 (1915). Thus it simply cannot be maintained, as the Court of Appeals below seemed to suggest, that the United States acted in derogation of the Oneidas' purported rights in the 100,000 acre tract because the United States was unaware of any claim of illegality with respect to the 1795 acquisition.

II. The Oneidas Have No Cause of Action Under Federal Law Against Current Landholders.

Neither federal common law nor federal statutory law provides the Oneidas with a cause of action against current landholders. Because there was no federal common law prior to the Court's decision in *Swift v. Tyson*[*] in 1842, no federal common law cause of action arose in favor of the Oneidas at the time of New York's allegedly improper 1795 acquisition. In any event, the Trade and Intercourse Act of 1793 would have preempted any federal common law cause of action if one had otherwise been available. No cause of action arose in favor of the Oneidas under federal statutory law, because Congress did not intend to permit an implied private right of action under the 1793 Trade and Intercourse Act.

A. *The Oneidas have no cause of action under federal common law against current landholders.*

As Judge Meskill, dissenting in the Court of Appeals below, noted, the federal common law cause of action upheld by the majority below "is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law." 719 F.2d at 545, Jt. App. at 250a (Meskill, J., dissenting). It is hardly surprising that no court recognized such a cause of action before, since in the early years of our federal system, when the 1795 acquisition occurred, there simply was no federal common law. This Court stated in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834):

> It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades

[*] 41 U.S. (16 Pet.) 1 (1842).

> the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated.

Id. at 658; *accord Sim's Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799); *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797). The Oneidas, therefore, had no federal common law cause of action when the 1795 transaction occurred. While federal courts began to develop federal common law after this Court's decision in *Swift v. Tyson* in 1842, "it remains true that federal courts, unlike their state law counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); *accord City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). Because the instances in which federal courts may create federal common law are "few and restricted," *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981), this Court should not permit this limited authority to be used to create today a federal common law cause of action to challenge a transaction that occurred 190 years ago.

Assuming *arguendo* that a federal common law cause of action would otherwise have existed, the 1793 Trade and Intercourse Act preempted that cause of action. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), provides the standard for analyzing whether the Oneida cause of action is preempted. The Court's decision in *City of Milwaukee* established that the relevant test for preemption was "whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively proscribed the use of federal common law." *Id.* at 315. The Court noted that "when the question is whether statutory or federal common law governs . . . 'we start with the assumption' that it is for Congress, not federal

courts, to articulate the apropriate standards to be applied as a matter of federal law." *Id.* at 316-17.

Applying the *City of Milwaukee* preemption test shows that the 1793 Trade and Intercourse Act preempted any federal common law remedy that might otherwise have existed.[9] The 1793 Act clearly "spoke directly to the question" of federal supervision of land transfers by Indian tribes by comprehensively regulating the circumstances under which land could be acquired from Indian tribes and by imposing criminal penalties for violations of the act's prohibitions. Negotiation for the purchase of an interest in Indian land without the approval of the United States was made a misdemeanor punishable by imprisonment not exceeding 12 months and a fine not exceeding $1,000. Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329. The same criminal penalty was imposed on a person making an unauthorized settlement on Indian land. *Id.* § 5. The President was authorized to take such measures as he might deem necessary to remove unlawful settlers. *Id.* Informant's suits were authorized to assist in the enforcement of the criminal fines. If an informant initiated the prosecution, he would receive one-half of the total fine collected, and the other half would go to the United States. If the United States instituted the prosecution, it received all of the fines collected. *Id.* § 12.

These provisions demonstrate that the 1793 Act was, particularly within the context of its time, a comprehensive statutory scheme for the regulation of Indian affairs and specifically for the acquisition of Indian lands. This comprehensive statutory scheme preempted any federal common law action that might otherwise have existed.

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[9] *See* Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action Under the Indian Trade and Intercourse Act*, 63 B.U.L. Rev. 853, 906-10 (1983).

B. *The Oneidas have no implied private right of action under the 1793 Act against current landholders.*

The Oneidas also lack a federal statutory cause of action against current landholders. Such a cause of action, if one were to exist, must be derived from the 1793 Trade and Intercourse Act. Since the 1793 Trade and Intercourse Act does not explicitly grant a cause of action to Indian tribes, any statutory cause of action under the 1793 Act in favor of Indian tribes must be implied from the statute.

Congressional intent is the touchstone for determining whether an implied private right of action can be asserted. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1982); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91 (1981). Only if Congress intended to create an implied private right of action under the 1793 Trade and Intercourse Act can the Oneidas assert such an action against current landholders. The factors used to determine legislative intent include "the language of the statute itself, its legislative history, the purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91 (1981); *accord, Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1982); *Universities Research Association v. Coutu*, 450 U.S. 754, 770 (1981).

The first factor used to determine congressional intent is the language of the statute. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 (1979). Section 8, the land transfer provision of the 1793 Trade and Intercourse Act, provided:

> [N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into

> pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed . . . .

Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329.

Section 8 is a criminal statute imposing criminal penalties of fines and imprisonment for its violation. This Court "has rarely inferred a private right of action under a criminal statute, and where it has done so, 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (quoting *Cort v. Ash*, 422 U.S. 66, 79 (1975)). There is nothing in the language of section 8 that indicates that Congress intended to permit an Indian tribe to bring a private right of action to enforce the provisions of section 8. *See* Crane, *supra* n.9, at 863-67.

The legislative history of the 1793 Act likewise provides no support for an implied right of action in favor of an Indian tribe to enforce section 8 of the Act. The 1793 Act was enacted to replace the 1790 Trade and Intercourse Act, which had in turn been intended as a "declarative law" recognizing the right of Indians to possess their lands, subject to divestment by the United States. 1 *American State Papers: Indian Affairs* 53-55 (1834) (report of Secretary of War Henry Knox).

The federal officials administering the 1790 Act became concerned that the means of enforcing the 1790 Act were inadequate, and urged Congress to add enforcement provisions to the act. *See* 1 *Messages and Papers of the President* 105 (J. Richardson ed. 1896); 1 *American State Papers: Indian Affairs* 119; *see also* Crane, *supra* n.9, at 874-75. Congress responded by enacting in

the 1793 Trade and Intercourse Act a comprehensive scheme of enforcement provisions to "give energy to" the Act. As already noted, section 8 of the 1793 Act made it a criminal offense to negotiate for the purchase of an interest in Indian land without the approval of the United States. In the 1793 Act, unauthorized settlement on Indian land was made subject to the same criminal penalty. Act of March 1, 1793, ch. 19, § 5, 1 Stat. 329. In addition the President was given authority to take such measures as he might deem necessary to remove unlawful settlers. *Id.*[10] Other sections of the 1793 Act contained additional enforcement provisions. *Id.* §§ 1-3, 6.

The comprehensiveness and variety of these enforcement mechanisms shows that Congress did not also intend to authorize Indian tribes to bring private rights of action under the Act against landholders. "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens . . . . In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 (1981). "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94 & n.30 (1981). If Congress had wanted to authorize such a private right of action, "it knew how to do so and [would have done] so expressly." *Touche, Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).

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[10] The 1796 Trade and Intercourse Act made clear that this provision meant that the President was authorized to use military force to expel unauthorized settlers from Indian land. Act of May 19, 1796, ch. 30, § 5, 1 Stat. 469. *See*, F. Prucha, *American Indian Policy in the Formative Years* 145 (1962). On several occasions this authority was used to evict unauthorized settlers. Prucha, *supra* at 154, 159-60, 165-66, 181.

The historical context of the 1793 Act and the purpose for its enactment also demonstrate that Congress did not intend to authorize a private right of action by Indian tribes against landholders. Legislation relating to Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [the legislation]." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Viewing the 1793 Trade and Intercourse Act in the context of its times, it is inconceivable that Congress would have expected Indian tribes to bring suits or would have intended to provide Indian tribes with an implied private right of action in federal courts.

The primary aspect of the historical context of the 1793 Act demonstrating that Congress did not intend to create a private right of action in favor of Indian tribes is quite simply that Indian tribes did not make a practice of filing lawsuits in 1793. Writing 40 years after the enactment of the 1793 Act, Chief Justice Marshall described the context of the 1780s and 1790s by stating:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. *This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them from among the parties who might sue in the courts of the union.*

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) (emphasis added). Many of the framers of the Constitution were also members of Congress in 1793, and would have continued to understand that Indian tribes would not file suit. Quite apart from whether as a technical matter Indian tribes had legal capacity to bring suit or courts had jurisdiction to hear those suits, Congress would not have intended to create an implied private right of action for Indian tribes when it was virtually inconceivable that Indian tribes would bring such suits.[11] Any problems arising from inadequate enforcement of the land transfer provision of the 1790 Trade and Intercourse Act would not have been cured by providing Indian tribes with a private right of action to enforce the provision in the 1793 Act. Congress would have believed that the executive branch of the federal government would be the only entity that could enforce the land transfer provision of the 1793 Act. Understanding this, Congress made the executive branch responsible for enforcing the land transfer provision of the 1793 Act by establishing criminal penalties and also by authorizing the President to take "such measures as he might deem necessary" to remove unauthorized settlers.

Executive branch enforcement of the land transfer provision of the 1793 Act was also the only practicable way to accomplish the primary purpose of the 1793 Act, which was to preserve peace on the frontier. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (purpose of 1790 Act was "to prevent destructive retaliations by the Indians", quoting President Washington); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); Prucha, *supra* n.10, at 8. In *Mohegan Tribe* the United States Court of Appeals for the Second Circuit stated: "it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions."[12]

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[11] In this context it is important to keep in mind that the 1793 Act was a temporary act that by its terms would only "be in force, for the term of two years, and from hence to the end of the next session of Congress, and no longer." Act of March 1, 1793, ch. 19, § 15, 1 Stat. 329. Thus Congress would not have been looking ahead to a time when Indian tribes would have become sufficiently knowledgeable about the non-Indian culture to be in a position to bring lawsuits in federal court.

[12] 638 F.2d at 622. One of the leading authorities on the Trade and Intercourse Act has written:

Congress had good reason to be concerned with preserving peace on the frontier in 1793. In 1790 and again in 1791 a United States army had marched into the Ohio country, and both times the Indian tribes had routed the army, inflicting heavy casualties. D. Smith, *The American Diplomatic Experience* 20 (1972). The demonstrated military prowess of the Indian tribes was made even more ominous by the presence of British military posts on United States soil in violation of the Treaty of Paris of 1783 between Great Britain and the United States ending the Revolution. *Id.* at 19-20. These posts were widely suspected of providing arms and encouragement to Indian tribes engaging in conflicts with the United States and held out the promise of an alliance between Great Britain and the Indian tribes to exploit American weaknesses in the hope of reversing the outcome of the American Revolution. *Id.*; *see* F. Cohen, *Handbook of Federal Indian Law* 419 (AMS Press reprint of 1942 edition).

Two events, both occurring after the enactment of the 1793 Act, reduced the military threat posed by the Indian tribes. The first was the victory of a United States army over the northwest Indian tribes at the Battle of Fallen Timbers, near Detroit, in 1794. D. Smith, *The American Diplomatic Experience* 25 (1972); Prucha, *supra* n.10, at 156. The second event was the signing of the Jay Treaty on November 14, 1794, which led to the removal of British military posts from the United States

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The goal of American statemen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility. But if the goal was an *orderly* advance, it was nevertheless *advance* of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result.

Prucha, *supra* n.11, at 3 (emphasis in original); *see also id.* at 48.

in 1796. D. Smith, *The American Diplomatic Experience* 24-25. The Congress that enacted the 1793 Act could not have known, of course, that either of these events would occur.[12]

III. The Oneida Claim Is Barred Because It Was Not Brought Until 175 Years After the Conveyance At Issue.

Assuming *arguendo* that the Oneidas have a cause of action under federal law and that the United States has not ratified the 1794 transaction, the Oneida claim is nevertheless precluded because it was not brought until 175 years after the 1795 transaction that is the subject of the claim. First, the courts below should have applied a federal statute of limitations derived by borrowing the most analogous state statute of limitations. Regardless of the particular New York statute of limitations chosen, the 175-year-old Oneida claim would be barred. Secondly, the Oneida claim should be barred by the federal law of laches. Finally, the Oneida claim should be barred with respect to those landholders who can establish that they

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[12] The Court of Appeals below apparently overlooked its own prior decision in *Mohegan Tribe* as well as the historical context outlined above when it stated that "[i]t is beyond dispute that the Nonintercourse Acts were enacted for the protection of Indian tribes as beneficiaries." 719 F.2d at 532, Jt. App. at 219a. While protection of Indian tribes is concededly the purpose of the act *today*, 190 years after the Trade and Intercourse Act was first enacted, the historical context described above shows that the protection of Indian tribes was not the primary purpose of the land transfer provision of the 1793 Trade and Intercourse Act. Furthermore, the concept of Indian tribes as wards or beneficiaries of the federal government acting as their trustee had not been developed in the law in 1793. It was not until 40 years later that Chief Justice Marshall wrote of Indian tribes: "Their relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *accord*, *Felix S. Cohen's Handbook of Federal Indian Law* 220 (1982 ed.) ("the concept of a federal trust responsibility to Indians evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*.").

or their predecessors in title are bona fide purchasers with respect to the Oneida claim.

Statutes of limitation perform an important jurisprudential function. As this court has stated:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); accord *Board of Regents* v. *Tomanio*, 446 U.S. 487-88 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). Despite this important judicial function served by statutes of limitations, both the Court of Appeals and the district court below held that no statute of limitations applied to bar the Oneida claims.[14] The courts below similarly held that related defenses, such as laches and bona fide purchaser for value, also did not apply.[15] In holding that statutes of limitation did not apply to bar the Oneida claim, the courts below relied on several other lower court decisions that have held that such defenses do not apply to Indian tribes asserting Nonintercourse Act claims.[16]

There appear to be two reasons why the courts below held that time-limitation defenses do not apply to claims

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[14] Jt. App. at 232a-53a; *id.* at 71a-76a.

[15] Jt. App. at 232a-53a; *id.* at 71a-76a.

[16] *See, e.g., Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976).

such as the one asserted by the Oneidas. *See* Crane, *supra* n.9, at 855 n.7. First, the courts reasoned that such defenses are state law defenses and that state law defenses cannot cut off a federal right. *See* Jt. App. at 232a. This reasoning completely misconstrues the Counties' argument. The Counties assert the statute of limitations defense as a matter of *federal* law, and refer to state law solely as a source from which the federal courts can derive the *federal* statute of limitations. Federal courts have often fashioned *federal* statutes of limitations by borrowing from the most closely analogous state law. *E.g., United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 (1981); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 488 (1980); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 n.29 (1976). In *Tomanio* this court stated:

> The importance of policies of repose in the federal, as well as in the state, system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless "borrowed" what it considered to be the most analogous state statute of limitations to bar tardily commenced proceedings. [Citation omitted.] This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established.

Board of Regents v. *Tomanio*, 446 U.S. 478, 488 (1980).[17]

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[17] The Court of Appeals held that New York's statute of limitations should not be borrowed because "[a]pplying New York's statute would permit a violation of the 1790 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts." Jt. App. at 232a. This reasoning is plainly wrong. *See Board of Regents* v. *Tomanio*, 446 U.S. 478, 488 (1980) (quoting *Robertson* v. *Wegmann*, 436 U.S. 584, 593 (1978)).

The second reason cited by the courts below to deny the application of the statute of limitations defense to the Oneida claim is that the defense does not apply to the United States. Since the United States could bring suit on behalf of an Indian tribe, and in doing so would normally be immune from a statute of limitations defense, the courts reasoned that an Indian tribe bringing suit in its own behalf should have the same immunity as the United States. The Court of Appeals below stated "[i]t would be anomalous to allow the trustee [i.e. the United States] to sue under more favorable conditions than those afforded the tribes themselves." Jt. App. at 232a.

It is far from obvious, however, why it is "anomalous" to treat Indian tribes differently from the United States. The United States, as sovereign, is entitled to immunity from certain defenses because of its unique governmental responsibility. This unique governmental responsibility of the United States makes it eminently reasonable to treat the United States differently from Indian tribes. The real anomaly is that this immunity, which is afforded to the United States because it is the United States, can be utilized by an Indian tribe in litigation in which the United States is not a participant.

The Oneida claim should also be barred by the doctrine of laches applied as a matter of federal law. *See Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804-05 (8th Cir. 1979), *cert. denied*, 445 U.S. 913 (1980). The doctrine of laches is one of the principles of repose applied by federal courts in order to assure

> that old grievances will some day be laid to rest, that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asserting them.

Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 481 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

Laches has been applied by the Supreme Court to bar Indian claims to land in circumstances considerably less compelling than those present in this case. In *Felix v. Patrick*, 145 U.S. 317 (1892), the heirs of an Indian sued to recover land from Patrick and his grantees. Patrick, in violation of an Act of Congress restricting the transfer of the land, had acquired the land from Felix under a conveyance that had been procured by fraud. By the time the suit was brought the land had become a part of the city of Omaha, Nebraska, and had greatly appreciated in value.

This Court held that the action was barred by laches.

> The real question is, whether equity demands that a party who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous.

Id. at 333. In affirming the dismissal of the action for laches, the Court emphasized several other considerations, including

> that which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases.[18]

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[18] *Id.* at 334. *See also Schrimpscher v. Stockton*, 183 U.S. 290 (1901); *Lemieux v. United States*, 15 F.2d 518 (8th Cir. 1926). Laches was held to be inapplicable to the facts of *Ewert v. Bluejacket*, 259 U.S. 129 (1922), because the defendant in that case,

The landholders subject to the Oneida claim stand in a much more favorable position in the eyes of equity than did the defendants in *Felix v. Patrick*. Here the Oneidas have waited 175 years before bringing their claim, rather than the 28-year period that had elapsed in *Felix*. During those 175 years an enormous structure of investments, expectations, foregone opportunities and other forms of reliance has been established with respect to the land on the basis of the validity of the title obtained by New York in 1795. Consequently, this Court should conclude that the Oneida claim is barred by the federal law of laches.

In addition to being barred by federal statute of limitations and federal laches defenses, the Oneida claim should also be barred with respect to those landholders who can establish that they or their predecessors in title are bona fide purchasers with respect to the Oneida claim. As this Court recognized in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926):

> It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .

Under the well-established equitable doctrine of bona fide purchaser, a landholder who can establish that he (1) purchased property in good faith, (2) without notice of any defects in title or adverse claims, and (3) for a valuable consideration, is immune from an adverse claim.[19]

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an Indian agent who had purchased land from Indians it was his job to protect, had acted in bad faith, while the doctrine of laches was "designed to protect good faith transactions." 259 U.S. at 138.

[19] *See, e.g., Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403-06 (1915); *United States v. California & Oregon Land Co.*, 148 U.S. 31, 42 (1893); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 311-17 (1887); *United States v. Koleno*, 226 F. 180, 182-83 (8th Cir. 1915); *United States v. Eaton Shale Co.*, 433 F. Supp. 1256, 1267 (D. Colo. 1977); *United States v. Demmon*, 72 F. Supp. 336 (D. Mont. 1947).

If landholders subject to the Oneida claim can satisfy the three elements of the bona fide purchaser doctrine, as it appears likely they can, the doctrine should be held to provide a complete defense to the Oneida claim.

Courts have long recognized the importance of the bona fide purchaser doctrine. As Chief Justice Marshall noted almost 175 years ago, without the doctrine "[a]ll titles would be insecure, and the intercourse between man and man would be very seriously obstructed . . . ."[20]

Courts have applied the bona fide purchaser doctrine to protect purchasers of Indian lands.[21] For example, in *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977), the court ruled that the termination of an Indian rancheria (a small reservation) by the Secretary of the Interior was "unlawful and void." When the rancheria was terminated, the Indians had received fee title to the land and subsequently over three-fourths of the land was conveyed to third parties. In fashioning relief for the void termination, the court allowed the Indians still holding the land to reconvey their land to the United States in trust, but protected the third party purchasers. The court stated that the Indians who transferred their land to bona fide purchasers should pursue claims for monetary relief against the United States. *Id.* at 6. The court stated:

> [T]he rights of third party non-Indian good faith purchasers, who hold 77% of the residential acreage

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[20] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 134 (1810); *accord Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 210-11 (1836).

[21] *See United States v. Debell*, 227 F. 760 (8th Cir. 1915); *United States v. Jacobs*, 195 F. 707 (8th Cir. 1912); *Pechanga Band of Mission Indians v. Kacor Realty, Inc.*, No. CU-78-4499-MML, slip op. at 9 (C.D. Cal. Aug. 22, 1980), *aff'd on other grounds*, 680 F.2d 71 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977); *Bisek v. Bellanger*, 5 F.2d 994 (D. Minn. 1925); *cf. Thlocco v. Magnolia Petroleum Co.*, 141 F.2d 934 (5th Cir.), *cert. denied*, 323 U.S. 785 (1944) (bona fide purchaser of oil and gas lease from Indian protected).

> on the Rancheria, must be protected. These transferees may have taken record title without knowledge of the intricacies of the fiduciary obligations of the Secretary and any resulting ownership defects. This will be accomplished through a declaration that only Indian distributees or their Indian transferees hold under voidable deeds. Only those persons will have the option of reconveying to the government. Those distributees who sold their land will retain their right to pursue monetary remedies in the Court of Claims.

Id.

The claim asserted by the Oneidas in this case is extraordinary. Their contention that the 1795 acquisition by New York was void and ineffective to pass title and that no subsequent events divested them of their right to possession threatens to upset 190 years of land transactions in New York. The burden of this extraordinary claim falls most directly on the thousands of private landholders residing on the land two centuries later, who purchased their land in complete good faith. Under the theory espoused by the Oneidas and adopted by the courts below, these innocent landholders are trespassers with no right to possess the land they hold. If the ruling below is followed to its logical conclusion, the Oneidas are apparently entitled to obtain ejectment of all the landholders within the 100,000 acre tract.

The Oneidas, perhaps awed themselves by the audacity of their claim, suggest that enforcing their purported right to possession of the 100,000 acre tract is not their true goal. *See* Brief of Oneida Indian Nation of Wisconsin and Oneida Indian Nation of New York in Opposition to Petitions for Certiorari 20-22. Rather, their goal is to obtain "an equitable settlement implemented by an act of Congress." *See id.* at 20. In an explanation of their strategy that is the height of understatement, the Oneidas note that "legal rulings made in this and other suits have played a constructive role in the legislative settlements," *id.* at 21, and that one "cannot lightly gainsay the familiar relation between the availability of judicial redress and the settlement of claims." *Id.* at 22. Phrased more bluntly, the Oneidas hope to use the threat to innocent landholders posed by their extraordinary claim to compel Congress to buy them off.

The Oneidas should not be permitted to use innocent landholders as their hostages in a war of nerves with Congress. The Oneidas may well be entitled to some compensation from the federal government for its breach of duty in failing to protect their interests two centuries ago. Congress provided a remedy for this breach of duty in the Indian Claims Commission; the Oneidas invoked the remedy and prevailed, only to renounce their victory, undoubtedly in the hope of obtaining a greater recovery from Congress by pursuing their present strategy.[22] Perhaps the remedy provided by Congress in the Indian Claims Commission Act was unduly parsimonious, or perhaps not, but it is for Congress to determine whether the Oneidas should receive some greater recovery.[23] The Oneidas should not be allowed to bolster their case before Congress with a claim grounded on the legal fiction—for it is a fiction—that the federal government intended 100,000 acres in central New York to remain in the possession of the Oneidas for the past 190 years, but stood by and permitted the State of New York, the Counties and countless private landholders to develop the wilder-

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[22] *See* note 6, *supra*.

[23] The Oneidas are not the only tribe that has sought to turn its back on the remedy provided by the Indian Claims Commission in the hope of obtaining a greater recovery from Congress by asserting a present right to possess huge amounts of land. *See, e.g., United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), *cert. granted*, No. 83-1476 (May 29, 1984) (Indian Claims Commission award of $26 million covering 22 million acres of land); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (Indian Claims Commission award of $105 million covering 7.3 million acres of land). In all these cases it is for Congress to determine if some additional recovery is warranted.

ness by building cities, homes, farms, businesses, and highways. The federal government has treated the 1795 acquisition as valid for the past 190 years, and it is simply too late to reverse that judgment now.

CONCLUSION

The judgment of the Court of Appeals, insofar as it affirmed the District Court's holding of liability against the Counties, should be reversed.

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PETITIONER'S

BRIEF

Nos. 83-1065, 83-1240.

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ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of the County of Oneida, New York, and the County of Madison, New York, as Petitioners in No. 83-1065.

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Questions Presented for Review.

1. Whether, assuming that an Indian tribe and the State of New York failed to comply with the Indian Trade and Intercourse Act of 1793 in making a conveyance of land in 1795, the present Indian respondents have a cause of action under federal substantive law against the present occupiers of that land, especially when neither respondents nor petitioners were parties to, or extant at the time of, the conveyance;

2. Whether, in any case, respondents' claims are barred because they were not brought until 175 years after the conveyance;

3. Whether the 1795 conveyance was subsequently ratified by the United States, and is therefore valid and enforceable;

4. Whether respondents' claims present non-justiciable political questions.

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Opinions Below.

The opinion of the District Court finding liability against petitioners the Counties of Madison and Oneida, New York ("the Counties") is reported at 434 F.Supp. 527 (N.D.N.Y. 1977). (Jt.App. at 45a.) The opinions of that court with respect to damages and finding liability against the State of New York ("the State") are both unreported. (Jt.App. at 154a, 188a.) The opinion of the Court of Appeals is reported at 719 F.2d 525 (2d Cir. 1983). (Jt.App. at 207a.) Prior opinions on jurisdictional issues not relevant here are reported at 464 F.2d 916 (2d Cir. 1972) and 414 U.S. 661 (1974). An opinion of the Court of Appeals dismissing an interlocutory appeal is reported at 622 F.2d 624 (2d Cir. 1980).

Jurisdiction.

The judgment of the Court of Appeals was entered on September 29, 1983. The Counties' petition for a writ of certiorari in No. 83-1065 was filed on December 28, 1983. The State's petition in No. 83-1240 was filed on January 25, 1984. This Court granted both petitions on March 19, 1984, and ordered the two cases consolidated. Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

Statutes and Treaties Involved.

1. "An Act to regulate trade and intercourse with the Indian tribes," Act of July 22, 1790, c. XXXIII, 1 Stat. 137;
2. "An Act to regulate Trade and Intercourse with the Indian Tribes," Act of March 1, 1793, c. XIX, 1 Stat. 329;
3. "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers," Act of May 19, 1796, c. XXX, 1 Stat. 469;
4. "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," Act of March 3, 1799, c. XLVI, 1 Stat. 743;
5. "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," Act of March 30, 1802, c. XIII, 2 Stat. 139;

6. Title 25, United States Code, Sections 177 and 180;
7. Title 28, United States Code, Section 2415;
8. Treaty of Canandaigua, November 11, 1794, 7 Stat. 44;
9. Treaty of September 15, 1795, between State of New York and Oneida Nation of Indians;
10. Treaty of June 1, 1798, between State of New York and Oneida Nation or Tribe of Indians; and
11. Treaty of June 4, 1802, between State of New York and Oneida Nation or Tribe of Indians.

Because of their length, the statutes and treaties above are set forth in the appendix to this brief.

Statement of the Case.

This is an action to recover damages for the wrongful occupation of 871.92 acres of land in New York State for the years 1968 and 1969. It was explicitly brought as a "test case," and it has served as the jurisdictional and substantive fountainhead for eastern Indian land claims litigation over the last decade. Respondents, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council ("the Oneidas"), plaintiffs below, claim to be the "direct descendants" of the original Oneida Indian Nation.[1] The Counties, petitioners in No. 83-1065 and defendants and third-party plaintiffs below, are the record owners of the subject land. The court found the Counties liable to the Oneidas for damages in the amount of $16,694, plus interest. The State, petitioner in No. 83-1240 and third-party defendant below, was found liable to indemnify the Counties for any damages payable to the Oneidas.

The basis of the liability judgment below was a finding that a 1795 cession transferring a vast tract of then-wilderness land from the Oneida Nation to the State was unlawful. The court

[1] The Counties' designation of the Indian respondents as "the Oneidas" is solely for the convenience of the Court. It is not intended to suggest any unity on the part of those parties. On the contrary, the three[2] duly respondents and the so-called "Houdenosaunee" are engaged in a bitter internecine dispute as to which is the proper governmental entity to succeed to the Oneida Nation, and to receive the monetary benefits and sovereign rights promised by this lawsuit. *See* text, *infra*, at 47-48.

ruled that because the transfer was unlawful, it is void; that every subsequent transfer of any land within that tract, including the subject land, is also void; and that therefore the Counties (and, implicitly, all others similarly situated) do not own, and never have owned, any of the subject land.

1. *Jurisdictional Proceedings, 1970-1974.*

The complaint was filed by the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin in the United States District Court for the Northern District of New York on February 5, 1970. (Jt.App. at 4a).[1] It alleged that the State and the original Oneida Nation entered into a treaty on September 15, 1795, whereby the Oneida Nation transferred approximately 100,000 acres of land to the State in return for a perpetual annuity; that no officer of the United States was present at the execution of that treaty; and that the treaty was not consented to or ratified or approved by the United States. The Oneidas claimed that the treaty therefore violated the "Indian Non-Intercourse Act, 1 Stat. 137," and that the transfer was thus invalid.[2] Because the Counties occupied parts of the treaty area for various public improvements, the Oneidas claimed that the Counties were "indebted" to them for the fair rental value of the land for the period of January 1, 1968, through December 31, 1969.

The District Court dismissed the claim for lack of federal question jurisdiction in an unpublished opinion in 1971. The Court of Appeals affirmed, 464 F.2d 916 (2d Cir. 1972). This

[1] The Oneida of the Thames Band Council intervened as plaintiff during the liability phase of the trial.

[2] The statute appearing at 1 Stat. 137 is the first Trade and Intercourse Act, which was enacted in 1790. The actual statute, if any, violated in 1795 was the Trade and Intercourse Act of 1793, 1 Stat. 329, the particular provision of that statute, if any, that was violated was section 8. The 1793 statute, like the 1790 Act which preceded it, was temporary in nature. It was repealed and replaced by a new Trade and Intercourse Act in 1796, Act of May 19, 1796, c. 30, 1 Stat. 469. Expanded and strengthened Trade and Intercourse Acts were in turn enacted in 1799, 1802, and 1834. Act of March 3, 1799, c. 46, 1 Stat. 743; Act of March 30, 1802, c. 13, 2 Stat. 139; Act of June 30, 1834, c. 161, 4 Stat. 729. The last of these acts was codified in its present form in 1874. *See* 25 U.S.C.A. § 177, note.

Court reversed and remanded, holding that *for jurisdictional purposes* the complaint sufficiently "asserted a current right to possession conferred by federal law, wholly independent of state law." 414 U.S. 661, 666 (1974). This Court did *not* rule on whether federal substantive law actually provided the asserted cause of action; it held only that the claim was not state-law based and was not so frivolous as to preclude federal jurisdiction to decide the substantive questions. 414 U.S. at 675-78.

On remand, the Counties filed third-party complaints seeking indemnity from the State. The District Court then trifurcated the case, trying the issues of the Counties' liability to the Oneidas first, damages second, and reserving the claims against the State for last.

2. *Liability Trial and Judgment, 1974-1977.*

A three-day trial was held on liability, and the District Court issued its findings on July 12, 1977. 434 F.Supp. 527 (N.D.N.Y. 1977). (Jt.App. at 45a.) The court first held that the Oneida Indian Nation of New York constituted a tribe within the meaning of the Trade and Intercourse Acts, and that it and the other plaintiffs were the "direct descendants" of the original Oneida Nation. 434 F.Supp. at 538. (Jt.App. at 63a.) It then found that the land involved was covered by the 1793 Act, as the "aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government. . . ." *Id.* Next, the court held that no United States commissioner was present at Albany at the consummation of the treaty, and it rejected arguments that the United States had subsequently consented to or ratified the transaction. 434 F.Supp. at 538-540. (Jt.App. at 64a-67a.) Finally, it found that the trust relationship between the Oneida Nation and the United States was neither terminated nor abandoned. 434 F.Supp. at 540. (Jt.App. at 68a.) The court held that "[a] prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established," *id.*, and concluded that as a result, the Oneidas' "right of occupancy and possession to the land in question was not alienated." 434 F.Supp. at 548.

(Jt.App. at 84a). Thus, the court stated, "[b]y the deed of 1795, the State acquired no rights against [the Oneidas]; consequently, its successors, the defendant counties, are in no better position." *Id.*

In finding liability against the Counties, the District Court rejected a number of affirmative defenses as a matter of law, including statute of limitations, laches, adverse possession, and bona fide purchaser for value. While it noted at the outset that the "impact of the Oneidas' claim will reach far beyond the boundaries of the present suit," and that "[t]he potential for disruption in the real estate market is obvious and is already being felt," it concluded it had no choice but to enter a finding for the Oneidas despite the "disruption and individual hardships" it would inevitably entail. 434 F.Supp. at 531. (Jt.App. at 47a-48a.)

3. *Post-Trial Motions, 1977-1981.*[4]

During the period from late 1977 through mid-1981, the District Court addressed various motions filed by the Oneidas and the Counties. Most significant for present purposes, the court ruled on two motions for summary judgment by the Counties. First, in May, 1979, it rejected the Counties' contention that the Oneidas' claims were precluded by a 1978 finding of liability against the United States on a claim the Oneidas had previously filed before the Indian Claims Commission. That action included a claim for damages from the United States on the ground that it failed to prevent the 1795 conveyance to New York.[5]

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[4] It was at this juncture in the proceedings that the present counsel to the Counties entered the case.

[5] In 1951, the Oneidas instituted proceedings against the United States before the Indian Claims Commission ("ICC") seeking additional compensation for land sold to the State by 27 treaties executed between 1785 and 1846, including the 1795 treaty at issue here. As to the post-1790 claims, including the claim based on the 1795 treaty, the ICC *determined that under the Trade and Intercourse Acts* the United States had an obligation to assure that the Oneidas received conscionable consideration for their lands, and that it would be liable if such consideration was not received. The ICC ordered that questions of value and consideration were to be determined after further proceedings. *Oneida Nation* v. *United States*, 26 Ind.Cl.Comm. 138 (1971). On appeal, the Court of Claims held that *scienter* on the part of the federal government was a

Second, in May, 1981, the District Court rejected a motion by the Counties questioning its authority to fashion a damages remedy because of the political question doctrine and several then-recent decisions of this Court concerning the appropriate roles of Congress and the federal judiciary in developing remedies. (Jt.App. at 87a, 123a.)

4. *Damages Trial, 1981.*

In October, 1981, the District Court concluded a trial on damages against the Counties. The court found that the Counties occupied 871.92 acres of land in the treaty area, including a park, a fire department radio tower, a gravel bed, and approximately 125 miles of highways and bridges. It specifically found that the Counties did not exist in 1795 (and thus could not have participated in the transaction complained of), that "[n]o evidence has been presented to show that [the Counties] acted other than in good faith," and that none of the present improvements existed in 1795. The court also found that the Oneidas were not excluded from using the subject land; that they had received compensation from the State as a result of the 1795 treaty; and that they had never refused or returned any of that compensation. (Jt.App. at 148a-152a.)

Because of the Counties' good-faith occupation, the District Court assessed the value of the occupied lands as if they were unimproved, thus effectively permitting the Counties to offset

prerequisite to liability, and remanded the action to the ICC for a determination of the government's knowledge, actual or constructive, of 23 treaties between New York and the Oneidas. 477 F.2d 939 (Ct.Cl. 1973).

On remand, the ICC held that the government had constructive notice of all of the treaties, "and probably had actual knowledge of most of them." 43 Ind.Cl.Comm. 373, 375 (1978). The ICC then ordered that the action proceed to a determination of value and consideration with respect to each of the treaties. On September 30, 1978, the ICC was dissolved, and the claim was accordingly transferred to the Court of Claims. Act of Oct. 8, 1976, Pub.L.No. 94-465, 90 Stat. 1990, *as amended*, Act of July 20, 1977, Pub.L.No. 95-69, 91 Stat. 273.

Shortly thereafter, the District Court in this action certified the issue raised by the Counties' motion under 28 U.S.C. § 1292(b). The Court of Appeals first took the Counties' appeal, but later dismissed it as improvidently accepted because the judgment of the ICC was deemed not final. 622 F.2d 624 (2d Cir. 1980). The Oneidas then voluntarily elected — solely for tactical reasons — to dismiss the entire claim prior to a determination of their damages. *See* text, *infra*, at 9, n.7.

the value of the improvements. Accordingly, the court awarded $9,060 damages against Madison County and $7,634 damages against Oneida County, plus annual interest at 6%, for the fair rental value of the land in the years 1968 and 1969. (Jt.App. at 154a-175a.)

5. *Third-Party Claim Against the State, 1982.*

In May, 1982, the District Court granted the Counties' motion for summary judgment against the State on their third-party complaints. The court's ruling was based on equitable indemnity principles, and was premised on a finding that the State was the actual wrongdoer. The court rejected the State's argument that the claim was barred by the Eleventh Amendment, holding that any such immunity was waived. (Jt.App. at 188a-199a.)

6. *Appellate Proceedings, 1982-1983.*

Final judgment was entered in the District Court on May 11, 1982, and all parties appealed. On September 29, 1983, a sharply divided Court of Appeals affirmed. 719 F.2d at 525. (Jt.App. at 207a.) The majority, composed of Senior Circuit Judges Lumbard and Mansfield, affirmed the finding of liability, rejecting the contentions that the Oneidas did not have a cause of action under federal law, that any such claim abated with the expiration of the 1793 Act, that the claim was time-barred or non-justiciable, and that the United States subsequently ratified the 1795 transaction. 719 F.2d at 530-40. (Jt.App. at 215a-237a.) The majority also affirmed all but two aspects of the judgment as to damages,* and affirmed the judgment against the State. *Id.* at 540-44. (Jt.App. at 237a-248a.)

*Although the District Court had specifically found that the Counties did not exist in 1795 and that no countervailing evidence suggesting bad faith on the part of the Counties had been offered, the majority held that the Counties had the burden of proving their good faith from the date of their creation up to the present time. The majority stated that it was "not prepared" to overturn the lower court's finding of good faith, but remanded for "clarification" of that issue. 719 F.2d at 542. (Jt.App. at 242a.) Such a burden of course, would be virtually impossible to meet as a practical matter. Among other things, the Counties would somehow have to prove affirmatively that unknown individuals, who had been dead for generations, were without knowledge of an alleged illegality that occurred in 1795.

Judge Meskill wrote a vigorous dissent. He first pointed out that the majority was inviting "potentially staggering claims" on what he called "skimpy authority." 719 F.2d at 545. (Jt.App. at 248a.) He then observed that the problem was essentially a political one, which Congress, not the judiciary, should address, and that in any event Congress had established administrative procedures to resolve Indian land claims. Finally, he examined the applicable law and concluded that neither the Trade and Intercourse Act nor federal common law provided the right of action claimed by the Oneidas. 719 F.2d at 545-49. (Jt.App. at 250a-258a.)

Summary of Argument.

1. The Oneidas assert a right of action based upon two sources: an implied right of action under the Trade and Intercourse Act of 1793 and a right of action under federal common law. No right of action should be implied under the 1793 Act under the standards applied by this Court, because the Second Congress could not possibly have intended any such result. No federal common law right of action such as this ever existed on behalf of an Indian tribe, and there is no reason to create one; more importantly, any such exercise of federal judicial lawmaking is clearly preempted by the Trade and Intercourse Acts.

2. The Oneidas waited nearly two centuries before filing their claim. Because no federal statute of limitations applies, the proper course is to borrow and apply as federal law the most nearly analogous statute of limitations of the state in which the court sits. The longest limitation period of any kind in New York is twenty years. Furthermore, the Trade and Intercourse Act of 1793 was a temporary statute; actions and disabilities for violations of the Act were preserved only until 1799, and subsequently abated.

3. The United States, by subsequent treaties in 1798 and 1802, retroactively ratified the 1795 conveyance and thereby gave it full legal effect. In addition, the conduct of the United States after 1795 and the jurisdictional history of the area

clearly show an intent on the part of the federal government to ratify the conveyance.

4. The Oneidas' claim presents solely non-justiciable political questions because: (1) the Constitution expressly commits responsibility for regulating Indian commerce to Congress, and Congress, by the Trade and Intercourse Act of 1793 and the Treaty of Canandaigua of 1794, expressly delegated all remedial authority for wrongful acquisition and occupation of Oneida lands exclusively to the President; and (2) the determination of this claim necessarily entails a political choice among various feuding Oneida factions as to which is the proper entity to be the sovereign government in the area and to receive the money awarded in this lawsuit.

Argument.

The judgment under review in this action is one of the most extraordinary ever entered by an American court. The wrong, if any, occurred nearly two centuries ago. The wronged party, if any, no longer exists, and has not for at least a century and a half. The defendants against whom the judgment was entered did not exist at the time of the wrong, and thus could not possibly have participated in it. This lawsuit thus involves a nearly 200-year-old claim, brought by plaintiffs who were not injured, against defendants who did not commit the wrong.

An even more remarkable aspect of the judgment is the nature of the purported wrong which it seeks to redress. That "wrong" is *not* that the land was stolen from the Oneida Nation; the District Court specifically found that the Oneidas were paid a perpetual annuity for the land, and that they never refused or returned any of the payments. Nor is the "wrong" that the consideration paid was inadequate; although both courts below hinted darkly to that effect, any such evidence was held to be irrelevant to the ultimate finding of liability.[7] The

[7] The Oneidas were provided with a forum (the Indian Claims Commission) in which to challenge the adequacy of that consideration, but voluntarily dismissed their claim before it proceeded to an award of damages. The dismissal was a tactical judgment by the Oneidas, apparently based upon a concern that a recovery against the United States might preclude them — either as a matter of law or sympathy —

claimed violation of law, rather, is that the 1793 Trade and Intercourse Act was not complied with *because no United States commissioner was present in Albany in 1795 at the signing of the treaty*. The primary historical purpose of the Trade and Intercourse Acts, however, was *not* solicitude for Indians, as helpless wards of the government; it was peace along the Indian frontier and the achievement of orderly westward expansion of white settlements. *See* text, *infra*, at 21-22. In order to vindicate that legislative purpose, thousands of titles to homes, farms, and businesses in Madison and Oneida counties, representing untold deprivations by generations of faultless persons, would be declared useless scraps of paper.

Perhaps the most extraordinary aspect of the judgment, however — and certainly one contemplated by the Oneidas and the District Court — is that it may compel further judgments of staggering proportions. This judgment itself implicitly holds that thousands of individuals and entities, in an area covering more than 150 square miles in the heart of central New York State, are now "trespassers." That consequence, however, is but the tip of the iceberg. The Oneida Nation alone executed more than 25 treaties with New York between 1788 and 1846; the Court of Appeals remarked in dictum below that only two of those treaties were made with federal supervision and approval. 719 F.2d at 529. (Jt.App. at 213a.) Indeed, the Oneidas have already filed suit seeking damages and to be "restored" to "immediate possession" of a five to six million acre tract of land in central New York State extending from Pennsylvania to the Canadian border, an area larger than Massachusetts or New Jersey. *See Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982).*

from prevailing against present landowners in litigation such as this. *See* 434 F.Supp. at 531, n.9 (Jt. App. at 49a); *United States v. Oneida Nation of New York*, 576 F.2d 870, 872-874 (Cl. Ct. 1978). *Cf. United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976) (payment of claim under ICC Act held to be evidence of extinguishment of Indian title); *see also Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (ICC constitutes exclusive remedy for claim of unlawful taking of Indian land).

*A hearing on various issues in that action is presently scheduled for September, 1984. The Court of Appeals recently ruled in that action that an Indian group styling itself as the "Hoodenosaunee," or the "Six Nations Iroquois Confederacy" should

Furthermore, the Oneidas are by no means unique. As the Court of Appeals also noted, at least one authority has estimated that the "State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government." 719 F.2d at 529 n.5, quoting F. Cohen, *Handbook of Federal Indian Law*, 420 n.24 (1942 ed.) (hereinafter "Cohen") (Jt.App. at 213a.) Other New York Indian groups also have filed suits in the District Court,* and similar suits by other Indian groups are pending or threatened in several other eastern and southern states.**

Thus, in the wake of this Court's 1974 decision in this case, Indian groups claiming title to millions of acres of private land

be permitted to intervene in order to protect its claim to be the true owner of most of New York west of Albany, including all former Oneida land, and all of the land at issue in this lawsuit. *See Oneida Indian Nation of Wisconsin v. New York*, No. 83-7910, slip op. (2d Cir. Apr. 5, 1984). The "Hoodenosaunee" claims that title properly rested in it by authority of the "Great Law of the Hoodenosaunee," or the "Gayaneshkowa," which in turn is said to derive solely from oral tradition. *Id. See* text, *infra*, at 47.

In addition to that action, two others brought by the Oneidas are presently pending in the District Court. *Oneida Indian Nation v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging approximately 25 treaties with New York State); *Oneida Indian Nation v. Williams*, 74-CV-187 (N.D.N.Y.) (action for ejectment against twenty-three landowners).

*An action seeking the recovery of approximately 70,000 acres filed by two entities claiming to be "direct descendants" of the Cayuga Indian Nation is presently pending in the Northern District of New York, and the complaint in that action expressly promises that a further claim will be brought to recover an additional three million acres. *See Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297 (N.D.N.Y. 1983). Other claims have been filed by a group calling itself the Canadian St. Regis Band of Mohawk Indians. *See Canadian St. Regis Band of Mohawk Indians v. New York*, 573 F.Supp. 1330 (N.D.N.Y. 1983).

**Litigation is presently pending in South Carolina, Massachusetts, Connecticut, and Florida in addition to New York. *See Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983); *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, No. 74-5828-MICN (D.Mass., filed 1974); *Christiantown Tribe v. Clark*, No. 83-3206-S (D.Mass., filed 1983); *Chappaquiddick Tribe v. Clark*, No. 83-3207-S (D.Mass., filed 1983); *Herring Pond Tribe v. Clark*, No. 83-3208-S (D.Mass., filed 1983); *Troy Tribe v. Clark*, No. 83-3209-S (D.Mass., filed 1983); *Mohegan Tribe v. Connecticut*, 528 F.Supp. 1359 (D.Conn. 1982); *Schaghticoke Tribe v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); *Seminole Tribe of Indians of Florida v. Florida*, No. 78-610-Civ-NCR (S.D.Fla., filed 1978).

The Indian Claims Limitation Act of 1982, Pub. L. 97-394, 96 Stat. 1976, required the Secretary of the Interior to publish in the Federal Register "a list of all claims accruing to any tribe, band or group of Indians or individual Indian on or

have flocked into federal courts. In response, the courts have blithely entertained centuries-old claims based upon everything from federal common law and implied rights of action under the early Trade and Intercourse Acts to the Articles of Confederation and "oral tradition." For the reasons set forth below, the Counties ask this Court to check what has become an unrestrained exercise of judicial lawmaking on a truly extraordinary scale.

I. The Oneidas do Not have a Cause of Action Against the Counties Under Federal Law.

The Oneidas assert a right of action based upon two sources: an implied right of action under the Trade and Intercourse Act of 1793, and a right of action under federal common law. This Court did not reach the issue of whether such rights are available in its 1974 decision on jurisdiction. 414 U.S. at 675-78.

A. *The Oneidas Do Not Have an Implied Right of Action under the Trade and Intercourse Acts.*

The Court has formulated its approach for analyzing claims for implied rights of action in various ways since first announcing it in *Cort* v. *Ash*, 422 U.S. 66 (1975). It is clear, however, that "[i]n evaluating such a claim, [the] focus must be on the intent of Congress when it enacted the statute in question." *Daily Income Fund, Inc.* v. *Fox*, 104 S.Ct. 831, 839, 78

before July 18, 1966," which had been identified or submitted to the Secretary, for statute of limitations and various other purposes.

Pursuant to that statute, twenty-one separate claims were listed in the "Eastern Area" as "Aboriginal Land Claims" or "Nonintercourse Act Land Claims." The groups listed included the Catawba; St. Regis; Oneida; Cayuga; Gay Head Band of Wampanoag; Western Pequot; Schaghticoke; Mohegan; Shinnecock; Seminole; Chitimacha; Tunica Biloxi; Stockbridge Munsee; Houma; Eastern Pequot; Alabama-Coushatta Tribe of Texas; and the Tigua Tribe of El Paso, Texas. 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983); 48 Fed. Reg. 51204, 51252 (Nov. 7, 1983). The land involved was not named, but presumably includes lands in Massachusetts, Connecticut, New York, Wisconsin, South Carolina, Florida, Mississippi, Louisiana, and Texas.

L. Ed. 2d 645, 655 (1984). The factors which are to be examined to discern that intent include: the statutory framework and language; the legislative history and purpose of the statute; the existence of express statutory remedies adequate to serve the legislative purpose; the identity of the class for whose particular benefit the statute was passed; and the traditional role of the states in affording the relief claimed. *Id.*; *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16 (1979).[11]

1. *Statutory Framework and Language.*

"We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief." *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, *supra*, 453 U.S. at 13. Because the statute, if any, violated by the 1795 conveyance was the 1793 Act, it is on that statute that the inquiry must focus. *Touche, Ross & Co.* v. *Redington*, 442 U.S. 560, 562 n.2, 568-69 (1979). *See also Daily Income Fund, Inc.* v. *Fox*, *supra*, 104 S.Ct. at 839, 78 L.Ed.2d at 655 ("our focus must be on the intent of Congress when it enacted the statute in question"). Section 8, the land sales section of the 1793 Act, provided:

> no purchase or grant of lands . . . from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians for the title or purchase of any lands by them held or claimed.

[11] That analytic framework applies irrespective of the age of the statute. *See, e.g.*, *California* v. *Sierra Club*, 451 U.S. 287 (1981) (1899 statute); *id.*, 451 U.S. at 298 (Stevens, J., concurring).

No right of action by a tribe is mentioned anywhere in the Act.

As its language indicates, § 8 is a *criminal* provision, which provides two criminal penalties (fines and imprisonment) for its violation. This Court "has rarely implied a private right of action under a criminal statute, and where it has done so, 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979), quoting *Cort* v. *Ash*, *supra*, 422 U.S. at 79. *See also Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 n.37 (1982) (victims of statutory crimes generally have no right to sue).

No such statutory basis exists here. While § 10 of the 1793 Act vested jurisdiction in the federal courts "to hear and determine all crimes, offences and misdemeanors against this Act," that section by its terms provided only *criminal*, and not civil, jurisdiction. This case is thus markedly different than *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), where the requisite "statutory basis" for inferring civil liability under § 14(a) of the Exchange Act was provided by § 27, which "specifically granted jurisdiction to the district courts over civil actions to enforce any liability or duty" created. *Cort* v. *Ash*, *supra*, 422 U.S. at 78 n.11.

In *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, this Court specifically rejected an implied civil damages remedy under a statutory provision analogous to the one at issue here. There, § 215 of the Investment Advisers Act of 1940 provided that contracts whose formation or performance would violate the Act would be "void." 444 U.S. at 16-17. The Court held that a buyer of investment advisory services had an implied right of action for rescission and restitution, but that no "other private causes of action, legal or equitable," including any which "could provide by indirection the equivalent of a private damages remedy," could be implied. *Id.* at 24 & n.14.[14] Thus,

[14] Even the "limited" equitable remedy implied under the language of § 215 of the IAA could not be implied under the 1793 Trade and Intercourse Act. First, the 1793 Act did not declare that conveyances made in violation of its terms would be void, but only of "no validity in law or equity" — in other words, not legally enforceable. 1793 Act, § 8. The section therefore simply imposed a disability,

even if the conclusion of the courts below that the 1795 conveyance was void is followed, it is plain that no private right of action for damages may be implied under § 8 of the 1793 Act.[15]

The other enforcement and relief provisions of the 1793 Act are also instructive concerning Congress' intent. As in *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, *supra*, 453 U.S. at 13-15, Congress expressly established a wide variety of enforcement and relief mechanisms in the 1793

which was removed by Congress in 1799. *See* text, *infra*, at 35-37. Furthermore, the Court in *Transamerica* expressly noted that "[j]urisdiction of such suits would exist under § 214 [citation omitted], which, though referring in terms only to 'suits in equity to enjoin any violations,' would equally sustain actions where simple declaratory relief or rescission is sought." 444 U.S. at 19 & n.9. The 1793 Act, as noted, provided *only* criminal jurisdiction, not civil or equitable jurisdiction. *Id.*, § 10.

[15] The Court of Appeals' analysis of the 1793 Act conflicts with both historical and modern constructions of such statutes. The antecedent of § 8 of the 1793 Act was § 4 of the 1790 Act, which simply provided:

> And be it enacted and declared, that no sale of lands made by any Indians, or nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

(Emphasis added). Section 8 of the 1793 Act, however, was not merely a "declarative law," *see* text, *infra* at 17-18, 28-29, but instead conformed more nearly to the structural paradigm of the day, containing "declaratory," "directory" and "sanctive" components. *See* 1 BLACKSTONE COMMENTARIES (1st ed.) 53-57. According to this paradigm, the "no validity" clause was the "declaratory" part of § 8 and provided no remedy. *See id.* at 54-56. This construction is consistent with this Court's construction of similar language in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 86 (1982) (under § 8(e) of National Labor Relations Act, declaring certain labor contracts to be "unfair labor practice" and "unenforceable and void," only NLRB may provide affirmative remedies, although a court may not enforce a contract provision which violates the statute).

Violation of the "directory" part of a statute gave rise to the statutory remedy: the "directory" part of § 8 prohibited "directly or indirectly" negotiating treaties with Indians. *See* 1 BLACKSTONE COMMENTARIES (1st ed.) 57. Since the Creeks did not even exist at the time of the 1795 treaty, they could not have violated § 8. Thus, the Creeks (and the Owiedas) presumably could "enforce" the 1795 conveyance. *See Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-87 (1970) (statute declaring contracts in violation "void" "establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party, but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation") (footnote omitted).

Act. These included forfeitures,[9] criminal penalties,[10] permit suspensions or revocations,[11] and an early precursor of the citizen's suit, the informant's suit provisions.[12] Section 5 is particularly deserving of attention, for it specifically addressed "settlement[s] on lands belonging to any Indian tribe." It made any person making such a settlement liable for fines and imprisonment and authorized "the President of the United States . . . to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make . . . a settlement thereon." In other words, Congress intended a two-pronged scheme for regulating encroachments on Indian lands: (a) those persons "directly or indirectly" negotiating conveyances without federal authority were subject to criminal penalties, and (b) those actually occupying Indian land were subject to criminal penalties and to removal by the President in the exercise of his discretion.

While § 5 directly addressed the occupancy of Indian land, § 6 expressly provided a remedy against certain remote purchasers of Indian property: those who knowingly purchased

[9] Section 3 required persons caught attempting to trade with the Indians, or found in Indian country without a license, to forfeit all the merchandise in their possession, and provided that such persons could be fined or imprisoned.

[10] Section 4 provided that citizens or inhabitants of the United States who committed crimes in Indian territory against friendly Indians would be punished in the same manner as if the crime had been committed in the state to which the citizens belonged. Section 5 provided that "if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe . . . he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months," and gave the President the power to remove unlawful settlers. Section 11 authorized the President and the territorial governors "to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law."

[11] Section 1 required persons trading with the Indian tribes to be licensed by the federal government and required a thousand dollar bond conditioned on the observance of government regulations on trade with the Indian tribes. Section 2 authorized recall of the license if the licensee failed to abide by the regulations.

[12] Section 12 provided that "all fines and forfeitures . . . shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use." Section 6 contained a similar provision applying to persons knowingly purchasing horses illegally brought out of Indian territory.

Indian horses obtained without a federal license. Thus, when Congress wanted to provide a remedy against unlawful occupiers of Indian land or against remote purchasers of Indian property obtained without the requisite federal sanction, "it knew how to do so and did so expressly." *Touche, Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 572.

"In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the [statute]." *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, *supra*, 453 U.S. at 14; *accord, Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 93-94, 97 (1981) ("The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies," and such a scheme creates a strong presumption that the omission of any particular remedy was deliberate); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 19. ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.") Because Congress set forth specific remedies as part of a comprehensive legislative scheme, no further remedies should be implied.

2. *Legislative History and Statutory Purpose.*

a. *Legislative History.*

The legislative history of the 1793 Act plainly demonstrates that Congress enacted criminal and military remedies, and no others, because it thought those remedies were the only available and effective means to preserve peace with the frontier tribes.

The initial version of the Trade and Intercourse Act, enacted in 1790, essentially followed the recommendations of Secretary of War Henry Knox. Knox had urged Congress, in a report dated July 17, 1789, to enact a "declarative law" recognizing the right of the Indians to possess their lands, subject only to divestment by the United States. 1 *American State Papers:*

Indian Affairs 52-54 (1832). The land sales provision of the 1790 Act, § 4, was just such a law. Alone among the 1790 Act's substantive provisions, it began with the words "be it enacted *and declared*" and contained no remedial provisions.

Those charged with administering the 1790 Act, however, soon found it wanting, because it did not contain adequate means of enforcement. In his Third Annual Address, delivered in 1791, President Washington urged Congress "that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating [Indians'] rights, shall infringe the treaties, and endanger the peace of the Union." 1 *American State Papers: Foreign Relations* 16 (1832). In a speech to Congress in 1792, the President renewed his plea: "I cannot dismiss the subject of Indian affairs, without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier. . . . ." Speech of President Washington, November 6, 1792, 1 *American State Papers: Foreign Relations* 119 (1832).

In response to the President's urging, Congress enacted a new Trade and Intercourse Act on March 1, 1793. Violation of the land sales provision was made a criminal offense, subject to a fine not exceeding $1,000 and up to 12 months' imprisonment. 1793 Act, § 8. Furthermore, the Act authorized the President "to take such measures, as he may judge necessary, to remove" violators, and it included an informers' suits provision to support the collection of the newly authorized criminal fines. *Id.*, §§ 5, 12. No right of action such as the Oneidas assert here was ever mentioned in the 1793 Act, as proposed or as enacted.

The legislative history of the subsequently-enacted Trade and Intercourse Acts strengthens the conclusion that Congress deliberately chose only certain particular remedies. As urged by Washington and Knox, § 5 of the 1796 Act expanded the President's power to remove illegal settlers by expressly au-

thorizing the use of military force. *See* 1 *American State Papers: Indian Affairs*, 472, 543-544 (1832); 1796 Act, § 5. Section 5 was further amended to provide that any person convicted of illegally settling on Indian land shall "forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid." Upon such forfeiture, the "right, title or claim forfeited" did not revert to the original Indian owner, but vested in *the United States*.

The new forfeiture clause sparked vigorous debate in the House of Representatives. *See generally Annals of Congress: The Debates and Proceedings in the Congress of the United States*, 4th Cong., 1st Sess., December 7, 1795 — June 1, 1796 ("*Annals*"), April 9, 1796, at 893-904. Proponents of the forfeiture clause argued that the previous version of § 5 in the 1793 Act had proved ineffectual in preventing illegal occupation of Indian land. Remarks of Rep. Crabb, *Annals* at 897; *see also* remarks of Rep. Hillhouse, *id.* at 898. Opponents of the clause argued on the basis of the proposition, accepted by proponents and opponents alike, that only "superior military force" would prevent whites from taking possession of Indian land. *Compare* remarks of Rep. Gallatin, *Annals* at 902-04 ("Was it supposed that if these persons were not deterred by the present law, which inflicts a penalty of one thousand dollars and imprisonment of one year, that they would be deterred by the present [*sic*] law? No such thing. They will say, 'if the Government are not strong enough to prevent us from going upon the land, they will not be able to drive us from it' ") *with* remarks of Rep. Hillhouse, *Annals* at 899. Rep. Gallatin went on to argue that "*as to any legal restraints the present provisions by law were sufficient, or, if the fines* were not large enough, *they* might be made larger." *id.* at 904 (emphasis added). Rep. Nichols argued that the forfeiture clause would constitute an inflexible penalty which would prevent the exercise of Presidential discretion to take into account mitigating circumstances. *Id.* at 896. No one ever suggested in the course of the debate that a private right of action by a tribe was an available remedy.

The forfeiture provision was ultimately eliminated when Congress passed the 1802 Trade and Intercourse Act. *See* Act of March 30, 1802, *supra*, § 5. Although there is no available legislative history explaining its deletion from the 1802 Act, the debates prior to its original passage in 1796 indicate that Congress was clearly troubled by the forfeiture remedy. Abandonment of the remedy suggests that Congress intended to rely solely upon criminal prosecutions to punish, and discretionary political and military powers to dispossess, those illegally occupying Indian land. *Cf. Daily Income Fund, Inc.* v. *Fox*, *supra*, 104 S.Ct. at 840-41, 78 L.Ed.2d at 656-58 (ultimate deletion of proposal expressly authorizing investment company to enforce statute itself "strongly suggests that . . . Congress did not intend to create an implied right of action in favor of the investment company").[9]

[9] The Court of Appeals stated that the "only [remnant] of legislative history available" is a speech by President Washington to the Senecas in December, 1790, in which he stated "[i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." The court's view was that Washington thought the 1790 and 1793 Acts permitted Indians to bring private causes of action. 719 F.2d at 536 n.15. (Jt.App. at 229a.)

The intent of Congress, of course, not the President, is controlling in determining whether a private right of action should exist. *See American Trucking Ass'ns* v. *A.T. & S.F. Ry.*, 387 U.S. 397, 417-18 (1967). In any event, if President Washington actually believed that a private right of action could be brought by a tribe in federal court in 1790, he was very much mistaken, as tribes were then denied access to federal courts on jurisdictional grounds. The Judiciary Act of 1789 provided for diversity jurisdiction and jurisdiction over actions involving foreign nations, but Indian tribes were then neither "citizens" nor "foreign nations" within the meaning of that statute. *See Standing Rock Sioux Indian Tribe* v. *Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Karrahoo* v. *Adams*, 14 F.Cas. 134 (C.C.D. Kan. 1870). According to Chief Justice Marshall,

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them from among the parties who might sue in the courts of the union.

Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831).

The Congress that drafted the Trade and Intercourse Acts of 1790 and 1793, of course, included many of the same "statesmen." Federal question jurisdiction, excepting a brief period in 1801, was not introduced until 1875, and the jurisdictional statute for actions brought by Indian tribes was not enacted until 1966. *Sutfin* v.

b. *Statutory Purpose.*

The preeminent purpose of the Trade and Intercourse Acts was to preserve peace on the Indian frontier, while effecting the orderly removal of tribes in favor of the advancing whites. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (purpose of 1790 Act "to prevent destructive retaliations by the Indians," quoting Seventh Annual Address of President Washington); *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) ("it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions"). *See generally* R. Lerner, *Reds and Whites: Rights and Wrongs*, 1971 Sup. Ct. Rev. 201. *Cf. Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979) ("Because of recurring trespass upon and illegal occupancy of Indian territory *a major purpose* of these Acts *as they developed* was to protect the rights of Indians to their properties") (emphasis added). According to the leading scholarly authority on the Trade and Intercourse Acts:

> The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature — aimed largely at restraining the actions of the whites and providing justice to the Indians *as the means of preventing hostility*.

Thompson, 415 U.S. 452, 464 & n.14 (1974); Act of Oct. 10, 1966, Pub. L. 89-635, 80 Stat. 880. Furthermore, it was widely assumed until at least the late 19th or early 20th century that Indian tribes lacked legal capacity to sue in federal courts absent statutory authority. *See Jaeger* v. *United States*, 27 Ct. Cl. 278, 285 (1892) ("Whenever [tribes] have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors"); R. Clinton & M. Hoeppp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: the Origins of the Eastern Land Claims*, ("Clinton & Hoeppp"), 31 Me.L.Rev. 17, 46-48 (1979). Indeed, as late as 1942 the leading authority on Indian law stated that the question of whether a tribe could maintain an action independent of statutory authority was one as to which "judgment must be reserved." Cohen, *supra*, at 285. Whether that view was correct is unimportant, as long as it was the prevailing legal view in 1793. *See Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Curran*, 456 U.S. 353, 378 n.61 (1982).

F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (1962) at 3 (hereinafter "Prucha") (emphasis added).

The view of the Court of Appeals that the 1793 Congress was concerned only for the welfare of helpless tribes simply cannot be supported. As that court itself observed in *Mohegan Tribe* v. *Connecticut*, *supra*:

> The evidence suggests that federal Indian policy was based upon the need to prevent Indian uprisings. . . . [T]he evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them, and . . . quite readily demonstrates that contemporary attitudes have colored our views of the original motives behind American Indian policy. . . .

638 F.2d at 621-22.

Moreover, even if it were assumed that protection of Indian tribes and peace on the frontier were dual purposes of the Act, that assumption would work *against*, not in favor of, an implied right of action. In *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64 (1978), this Court held that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other." Inference of a private judicial remedy would have *disserved* the 1793 Act's goal of enabling the President to preserve peace on the frontiers; it would have transferred the government's sensitive peace-keeping function from the executive to the judiciary, which had neither the authority, the power, nor the expertise to maintain the peace, and it would have transferred the enforcement process from executive discretion to private adversarial litigation. As James Madison said when he introduced the 1793 Act's land sales provision:

> [M]isunderstandings, quarrels, and wars with the Indians, had originated from the circumstance of persons having obtained, through fraud, or other improper means, possession of lands belonging to the Indians. This consideration rendered it highly important *that this whole business should be under the absolute and sole direction of the public authority*. . . .

1791-1793 Annals of the Congress of the United States (J. Gales ed., 1793) 427-28 (emphasis added).

3. *Adequacy of Express Remedies to Serve the Legislative Purpose.*

The 1793 Act contained numerous express remedies. Unauthorized conveyances and occupation of Indian land were made crimes, and informants were empowered and encouraged to institute prosecutions if the United States failed to do so. If, nonetheless, some party induced an unlawful conveyance, that party was disabled from enforcing it. If, nonetheless, some party occupied Indian land, the President could remove him. As a matter of historical fact, it was to *these* remedies, *not* to the courts, that the Indians themselves actually made recourse. *See Prucha*, *supra*, at 150-51, 158-66. And, it was *these* remedies that held out the only real hope for mitigating unlawful settlements and intrusions on Indian lands. *See id.* at 143-44, 183-87.

It is surely no accident that Congress enacted a wide range of remedial measures *without* providing a private ejectment remedy to Indian tribes.

It is inconceivable that Congress intended to keep sales of Indian land under tight public control, yet leave redress of illegal sales to uncontrolled private enforcement. Rather than provide for private litigation — between militantly hostile parties of radically differing cultures — Congress chose to grant an ejectment-like remedy to the President, who could exercise it, in his discretion, in a controlled and deliberate manner.[*] The express remedies provided by Congress were adequate to further the legislative purpose of maintaining peace, and should not be added to by this Court.

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[*] It is noteworthy that in *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1856) (a trespass action brought in state court by an individual Indian), the Court ruled

4. *Identity of the Class for Whose Particular Benefit the Statute was Passed.*

Because its chief purpose was the preservation of peace, "the legislative history supports the view that the Act was designed to benefit the public at large," not Indians as a particular class. *California* v. *Sierra Club*, *supra*, 451 U.S. at 294-95. Moreover, even if Indians were "undoubtedly" within such a class, the Act's express provisions ensure that their rights under the statute can be vindicated by parties acting on their behalf, making implication of further rights unnecessary. *See Daily Income Fund, Inc.* v. *Fox*, *supra*, 104 S.Ct. at 841, 78 L.Ed.2d at 659.

5. *Traditional Role of the States.*

State law provided remedies to Indians throughout the nineteenth century. *See, e.g., Seneca Nation* v. *Christy*, 162 U.S. 283 (1896); New York law in particular protected the Oneidas and their lands from pre-constitutional times. *See generally Goodell* v. *Jackson*, 20 Johns. 693 (N.Y. 1823). Thus, this factor, too, weighs against imputing to Congress an intent to provide the asserted implied right of action.

In summary, the evidence is overwhelming that the Second Congress did not intend to provide a private right of action to Indian tribes under the Trade and Intercourse Act of 1793.

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that even where the Indians had ceded title to their lands, both forcible removal and actions in ejectment were impermissible remedies:

> It is difficult to believe that it could have been intended by the Government that [the Indians] were to be left, after they had parted with their title to their homes, to be expelled by the irregular force and violence of the individuals who had acquired it, *or through the intervention of the courts of justice*. As we have seen, the Seneca Nation upon the four reservations consisted of a population of some two thousand six hundred and thirty-three souls; and if we include the Tuscaroras, whose lands were also purchased under the same treaty, nearly three thousand. *It is obvious that any such litigation would be appalling.*

Id., 60 U.S. at 571 (emphasis added).

B. *The Oneidas Do Not Have a Cause of Action under Federal Common Law.*

As the concurring opinion in this Court's 1974 decision in this action noted,

> the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession.

414 U.S. at 683. The Oneidas do *not* seek ejectment under state common law, but as a matter of *federal* common law.

It is beyond dispute that the Oneida Nation had no right in 1795 to bring an action such as this under federal common law.[*] Indeed, as the dissent below pointed out, "[n]o case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law." 719 F.2d at 545. (Jt.App. at 250a.)[*] Any federal common law right of action on behalf of the Oneidas must therefore be created out of whole cloth. Since *Erie R.* v. *Tompkins*, 304 U.S. 64 (1938), however, the creation of federal common law has been resorted to only as a "necessary expedient" in a "'few and restricted' instances." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313-14 (1981). There is no extraordinary expediency here demanding the creation of such a right.

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[*] No federal common law of any kind existed prior to 1842. As early as 1797, the Court expressly looked only to state common law. *see Brown* v. *Van Braam*, 3 U.S. (3 Dall.) 344, 350 (1797), and in *Sims' Lessee* v. *Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799), the court specifically looked to state common law concerning ejectment. In *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (the year the last Trade and Intercourse Act was passed) the Court stated flatly that there was no federal common law. Even under the regime established by *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), state law governed "rights and titles to things having a permanent locality, such as rights and titles to real estate."

[*] The Court of Appeals below relied upon *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223 (1850) for the proposition that such a common law right has long been available. 719 F.2d at 540. (Jt. App. at 238a). While the *Marsh* court observed that the right to maintain "an action of ejectment . . . on an Indian right to occupancy and use, is not open to question," 49 U.S. at 232, that case was a *state* law action brought in *state court* by a non-Indian. *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), cited in *Marsh*, was a diversity action involving a title dispute between non-Indians and was decided at a time when there was no federal common law.

First, Congress has already enacted appropriate remedies for the wrong complained of by the Oneidas, thereby eliminating the need for further judicial lawmaking. As this Court noted in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982):

> The dissent cites *Marbury* [v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)] for the proposition that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, lost his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim.

457 U.S. at 754 n.37 (emphasis in original).

The Oneidas *were* provided with other remedies, and indeed they went "elsewhere" with their claims. Congress established the Indian Claims Commission as one such remedy; the Oneidas won a finding of liability against the United States in that forum, but chose not to reap its benefits. *See* text, *supra*, at nn. 5 & 9. Congress also established a procedure for the Oneidas to take their claims to the Executive under the Treaty of Canandaigua of 1794; the Oneidas did so, and the Executive declared their Indian Claims Commission remedy adequate. *See* text, *infra*, at 45-46. Finally, in the 1793 Trade and Intercourse Act itself, Congress empowered *the President* to remove unlawful occupiers of Indian lands, and to seek criminal penalties. *See* text, *supra*, at 18. In this context, federal common law is wholly unnecessary to vindicate any rights created by the 1793 Act.

A further reason for judicial forbearance was suggested by the Court in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981). There, the Court refused to create a federal common law right of contribution in antitrust, stating:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

451 U.S. at 646-47, quoting *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980). *Accord, Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 95-98.

The necessary implication of the judgment below is that the Oneidas (or rather some as-yet-unknown faction of Oneidas) will be "reestablished" as the sovereign government over a large tract in the heart of New York State. At a minimum, and notwithstanding existing jurisdictional statutes, that government will have broad regulatory powers superior to and independent of those of state and local governments. *Cf.* 25 U.S.C. §§ 232, 233 *and Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310, 312-13 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) and cases cited therein. Such a "reestablishment" of a sovereign Indian government after 200 years of state and private control and development is, to say the least, "a matter of high policy" which "involves the balancing of competing values and interests" and a range of factors which dwarfs the complexity of the issue presented in *Texas Industries*.

Of far greater significance, moreover, is the fact that the enactment of the Trade and Intercourse Acts preempted any federal common law right of action. The starting point for the preemption analysis is this Court's opinion in *City of Milwaukee* v. *Illinois*, *supra* ("*Milwaukee II*").

Milwaukee II stated three fundamental principles of constitutional jurisprudence. First, "[f]ederal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." 451 U.S. at 312. Second, "[t]he enactment of a federal

rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." 451 U.S. at 312-13. Third, "[f]ederal common law is a 'necessary expedient,' . . . and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. at 314. The Court went on to explain that, accordingly, the relevant inquiry is "whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively prescribed the use of federal common law." 451 U.S. at 315. "[W]hen the question is whether federal statutory or federal common law governs, . . . 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." 451 U.S. at 316-17.

Milwaukee II held that the federal common law of nuisance in the area of water pollution was preempted by the enactment of the Federal Water Pollution Control act ("FWPCA"). The Court first found that Congress intended, in enacting the 1972 amendments to FWPCA, to establish an all-encompassing program of regulation. 451 U.S. at 318. Second, those amendments established statutory controls on the very acts Illinois sought to abate under federal common law, and "[f]ederal courts lack authority to impose more stringent . . . limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." 451 U.S. at 320. Finally, the 1972 amendments provided a forum in which the interest of Illinois could be protected, which had not been provided under the prior law. 451 U.S. at 325-26. *Accord, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, supra*, 453 U.S. at 22.

The similarities between the *Milwaukee* cases and the present case are compelling. The first Trade and Intercourse Act, enacted in 1790, contained only six sections. Its land sales provision was merely declaratory, it provided no forum for

protecting federal or tribal interests, and it contained no remedies for violations. Dissatisfied with these deficiencies, President Washington urged Congress to adopt a more comprehensive statute, including the infliction of penalties for violation of the statute. *See* text, *supra*, at 18. Congress responded with the 1793 Trade and Intercourse Act.

The 1793 Act was far more comprehensive than the 1790 Act, particularly with respect to Indian lands. The land sales provision was made enforceable by the addition of criminal penalties for the illegal negotiation of the purchase of any Indian land. 1793 Act, § 8. The new act also provided criminal fines and imprisonment for unlawful settlements and authorized the President to take such measures as he might deem necessary to remove unlawful settlers. *Id.*, § 5. A general informants' suit provision was included to support the collection of the newly authorized fines. *Id.*, § 12. In addition, the 1793 Act added lengthy sections dealing with horse thieves and horse traders (§ 6); prohibiting various employees in Indian affairs from having an interest or concern in trade with the Indians (§ 7); providing for the furnishing of certain goods and services to tribes (§ 9); and providing that Indians "living on lands surrounded by settlements of the citizens of the United States" would not be subject to trade restrictions (§ 13).

Thus, like the 1972 amendments to the FWPCA at issue in *Milwaukee II*, the 1793 Act (a) established a comprehensive program for the regulation of Indian trade and intercourse, including the disposition of Indian lands; (b) established criminal and administrative limitations and controls (including ejectment-like remedies) on the very acts for which the Oneidas seek relief; and (c) provided for the institution of suit in a federal forum to enforce the controls and sanctions of the Act.

The Court of Appeals, in rejecting the Counties' preemption argument, remarked that "[t]he Trade and Intercourse Acts were not comprehensive statutes." 719 F.2d at 531. (Jt. App. at 218a.) As the dissent correctly pointed out, however, the court was selectively applying contemporary standards to divine the intent of the Second Congress, sitting in 1793. The Trade and Intercourse Acts, in fact, provided comprehensive

criminal and administrative controls and mechanisms that were unusually elaborate for the late eighteenth century. Even in the past decade, this Court has held far less imposing enactments to preempt the creation of federal common law. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the Court held that the Death on the High Seas Act, 46 U.S.C. §§ 761-768, an eight-section statute, preempted creation of federal common law in admiralty. In *Northwest Airlines, Inc. v. Transport Workers Union*, *supra*, 451 U.S. at 77, the Court held that the Equal Pay Act of 1963, *one subsection of the* Fair Labor Standards Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, a 17-section statute, preempted the creation of federal common law.[29]

When such a comprehensive statutory scheme is enacted, federal courts are not free to supplement it: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, *supra*, 436 U.S. at 625.[30] In any case, the 1793 Act *expressly* "spoke directly" to the very question raised here — the remedies for unlawful occupation of Indian land — and those remedial provisions are "detailed and specific." *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, *supra*, 451 U.S. at 644. The 1793 Act has therefore preempted whatever common law right of action may otherwise have existed, and precludes any need for the extraordinary exercise of judicial lawmaking.

[29] The Court of Appeals also held that congressional intent to preempt federal common law in the area of Indian property rights must be "plain and unambiguous," citing *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941). 719 F.2d at 231-32. (*It.* App. at 219a.) That decision has nothing whatsoever to do with congressional preemption, and is therefore clearly inapposite. There is no reason, in any event, why congressional intent to preempt in the area of Indian law should be held to a stricter standard than that prevailing in other areas of strong federal concern, such as admiralty, environmental protection, or civil rights. *See Mobil Oil Corp. v. Higginbotham*, *supra*; *Milwaukee II*, *supra*; *Northwest Airlines, Inc. v. Transport Workers*, *supra*.

[30] If Congress desires to preserve a common law remedy in an area covered by a statutory scheme, it may do so expressly. *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976) (construing 49 U.S.C. § 1506: "Nothing contained in this chapter shall in any way abridge or alter remedies now existing at common law . . . but the provisions of this chapter are in addition to such remedies.").

II. The Oneidas' Claim Should Be Barred Because It Was Not Brought Until 175 Years After the Conveyance at Issue.

A. *The Claim is Barred by the Applicable Statute of Limitations.*

The wrong, if any, which this lawsuit purports to vindicate occurred on September 15, 1795. This nation was then a struggling aggregation of former colonies, clustered on the edge of a vast wilderness populated chiefly by hostile and warring Indian tribes.

The complaint was filed on February 5, 1970, nearly 175 years later. The land that had once been virgin forest is now located in the developed heart of one of the most populous states in the union. Generations of innocent persons, relying upon the justifiable belief that they held good title, have invested their savings and labor into the land, and have built homes, farms, and businesses upon it. The Court of Appeals, however, brushed away the Counties' temporal defenses in two cursory paragraphs, without even addressing the gross unfairness of permitting such a result.

First, the court held that the Oneidas could not be subject to state law limitations periods borrowed under federal law, because (a) doing so would permit a violation of the 1793 Act to go unremedied, and (b) the United States as trustee for a tribe would not be subject to state delay-based defenses, and it would be "anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribe themselves." 719 F.2d at 238. (*It.* App. at 232a.) The court then observed that the statute which governs suits by the United States on behalf of Indian tribes, 28 U.S.C. § 2415, provided "some guidance"; it concluded that because the Oneidas' claim would not be barred under the statute if brought by the United States, it should not be barred when brought by the Oneidas themselves. 719 F.2d at 238. (*It.* App. at 232a-233a.)[31]

[31] The Court of Appeals thus held, in essence, that a cause of action which accrued in 1795, and which was time-barred under New York law for years, was controlled by a statute originally enacted by Congress in 1966. Act of July

The court's opinion is based entirely on the belief that Indian tribes and the United States must be treated *exactly* alike for statute of limitations purposes. That view, however, is directly contrary to the intent of Congress in enacting 28 U.S.C. § 2415, and is without a sound basis in law and policy.

First, 28 U.S.C. § 2415, as its language and legislative history plainly indicate, was most definitely *never* intended by Congress to apply to suits brought by tribes themselves. That statute applies only to actions

> . . . for money damages brought *by the United States or an officer or agency thereof* . . . *for or on behalf of* a recognized tribe, band or group of American Indians. . . .

28 U.S.C. § 2415(b) (emphasis added). Nowhere does the statute mention an action brought by a tribe itself.

The legislative history of Section 2415 clearly demonstrates that it was not intended to apply to tribes. At hearings in 1972 and 1977 on proposed extensions of the time period set forth in the statute, officials of both the United States and state governments testified that the statute could not possibly apply to suits brought by tribes themselves. *See, e.g.*, remarks of William A. Gershuny, Associate Solicitor for Indian Matters, Dept. of the Interior, *Time Extension for Commencing Actions on Behalf of Indians: Hearing on S. 3877 and H.R. 13825 before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 92nd Cong. 2d Sess., 23 (September 12, 1972); remarks of Joseph E. Brennan, Attorney General of Maine, *Statute of Limitations Extension for Indian Claims: Hearings before the U.S. Senate Select Comm. on Indian Affairs on S. 1377*, 95th Cong., 2d Sess., 76-77 (May 3 and 16, 1977). During the debate on the 1977 bill, Rep. Cohen of

[illegible] Pub. L. 89-505, 80 Stat. 304. Once a statute of limitations as to an action to recover property expires, any attempt to revive the action "falls nothing short of an attempt arbitrarily to take property from one having perfect title and to subject it to an extinguished claim of another" in violation of due process of law. *Stewart v. Keyes*, 295 U.S. 403, 417 (1935) (act of Congress removing bar of state statute of limitations in actions to recover allotted Indian lands held unconstitutional).

Maine stated flatly that "I would like to point out what this bill does not do . . . [I]t does not pertain to claims brought by tribes themselves. The only thing this bill pertains to are suits brought by the Justice Department on behalf of Indian tribes for money damages only." *Cong. Rec.*, v. 123, p. 22166 (July 11, 1977). This view was echoed by an opponent of the bill as well. *Id.* at 22168 (remarks of Mr. Dicks).[29]

It is therefore plain that Congress intended that the United States and Indian tribes be treated differently for statute of limitations purposes. There is, furthermore, nothing "anomalous" about that disparity of treatment. It is inherent in the guardian-ward relationship that the guardian possesses certain rights and powers which the ward cannot exercise. In addition, the United States has significantly different concerns than an Indian tribe; for example, the United States has an obligation to consider the interests of all parties, including the well-founded expectations of innocent non-Indian landowners. Thus, the United States declined to prosecute this action on behalf of the Oneidas *in favor of another federal remedy*, the Indian Claims Commission, that was far less disruptive and imposed no hardship on blameless persons. *See* text, *infra* at 46.

The so-called "anomaly" at issue here is a regular feature of Indian law. For example, in *United States* v. *Minnesota*, 270 U.S. 181 (1926), where this Court defined the sovereign interest of the United States in suits to recover Indian lands, the Court acknowledged that the United States was able to sue in that case while its Indian wards could not. The Court pointed

[29] *See also Cong. Rec.* v. 123, p. 22499 (July 12, 1977) (remarks of Mr. Cohen); p. 22500 (remarks of Mr. Foley); p. 22507 (remarks of Mr. Dicks); p. 22509 (remarks of Mr. Studds); p. 22510 (remarks of Mr. Yates) (both proponents and opponents of a separate proposed amendment agreed that nothing in § 2415 would affect actions brought by Indian tribes themselves for trespass damages); *Statute of Limitations Extension: Hearing Before the U.S. Senate Select Committee on Indian Affairs*, 96th Cong., 1st Sess., 11 (December 17, 1979) (remarks of Mr. Walker); *Cong. Rec.*, v. 126, p. S1641 (February 20, 1980) (remarks of Sen. Melcher); p. S1642 (remarks of Sen. Cohen) (again, both proponents and opponents of the bill agreed that it would have no effect on suits brought by Indian tribes on their own behalf.) Similar debate occurred in the House of Representatives. *Cong. Rec.*, v. 126, p. H1943 (March 18, 1980) (remarks of Mr. Clausen); *Cong. Rec.* v. 126, p. H1945 (March 18, 1980) (remarks of Mr. Marlenee and Mr. Daniel[illegible]).

to this disparity of rights and status *as a reason for permitting the United States to sue*. 270 U.S. at 195.[16]

In actuality, no federal statute of limitations applies to this claim. In such a case, it is well-settled that the proper course is for the court to adopt — as a matter of federal law — the most nearly analogous state statute of limitations for the state in which the court sits. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). State limitations statutes will not be borrowed *only* "if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co.* v. *Equal Employment Opportunity Comm'n*, 432 U.S. 355, 367 (1977).[17]

"[A] state statute [of limitations] cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 488 (1980), quoting *Robertson* v. *Wegmann*, 436 U.S. 584, 593 (1978). Nor is the application of state law "inconsistent" with federal Indian policy simply because it is created by the states and not the federal government. *See Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 671-74 (1979) (state law of avulsion and accretion applied to determine title to Indian land); *Board of Comm'rs* v. *United States*, 308 U.S. 343, 351-52 (1939) (state law of interest applied in action involving taxation of Indian land). For this Court to rule that a New York statute of limitations bars a 175-year-old claim — when Congress has expressly declined to enact a controlling federal statute — would not be inconsistent with federal Indian policy in the slightest respect, for that policy may still be

[16] The purported "anomaly" at issue also occurs in other fields of law. For example, private federal securities law plaintiffs are routinely subjected to borrowed state statutes of limitation, while the SEC is not. *See, e.g., Securities & Exchange Comm'n* v. *Penn Central Co.*, 425 F.Supp. 593, 599 (E.D. Pa. 1976).

[17] The Court of Appeals offered two reasons why the application of New York law would be "inconsistent": the so-called anomaly of treating the United States and an Indian tribe differently, discussed above, and the fact that it "would permit a violation of the 1793 Act to go unremedied." 719 F.2d at 519. (Jt. App. at 232a.) The latter proposition is absurd on its face. The *application* of *any* statute of limitations to bar *any* valid claim necessarily leaves a wrong unremedied.

vindicated by the United States under *United States* v. *Minnesota*, *supra*. Furthermore, it would further a strong federal policy favoring repose.[18]

The most analogous New York statute is N.Y.Civ.Prac.Law § 212, which creates a ten-year limitations period on actions for the recovery of real property. In any event, the longest New York statute of limitations for *any* cause of action is twenty years. N.Y.Civ.Prac.Law § 211. The Oneidas' cause of action therefore expired long ago.

B. *All Actions and Disabilities under the Trade and Intercourse Act of 1793 have Abated.*

The Trade and Intercourse Act of 1793 was *not* an amendment to the 1790 Act. It was a *new* statute, which expressly repealed "all and every other act and acts coming within [its] purview." 1793 Act, § 14. Furthermore, it was a *temporary* enactment; it specifically provided that it would only "be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer." *Id.*, § 15.

On May 19, 1796, Congress repealed the 1793 Act, and enacted a new Trade and Intercourse Act. 1796 Act, § 21. The repealer section of the 1796 Act contained the following savings clause:

[18] As this Court noted in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

That principle is particularly important where titles to real estate are involved. *See Lewis* v. *Marshall*, 30 U.S. (5 Pet.) 470, 477-78 (1831); *see also Felix* v. *Patrick*, 145 U.S. 317, 333 (1892) (failure to dismiss claim involving Indian land "would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation."). Its application to this case is emphasized by the Court of Appeals' holding that the Counties must prove good faith occupation all the way back to 1795.

> *Provided, nevertheless*, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the [repealed act or acts]; in the same manner, as if the said act or acts were continued, and in full force and virtue.

Id. The 1796 Act, too, was a temporary statute by its express terms. *Id.*, § 22. On March 3, 1799, Congress repealed the 1796 Act, and again enacted a new — and temporary — Trade and Intercourse Act. 1799 Act, § 21. The repealer section of the 1799 Act contained a similar savings clause. *Id.*

Thus, the Trade and Intercourse Act of 1793 was only a temporary statute, and it was specifically repealed in 1796. Prior to 1871, at common law, when a statute creating either criminal or civil penalties expired or was repealed, all actions commenced under it which had not proceeded to final judgment immediately abated unless the repealing statute provided for the continuation of such suits. *See, e.g., Hamm* v. *City of Rock Hill*, 379 U.S. 306, 322-23 (1964) (Harlan, J., dissenting); *Gulf, Colorado & Santa Fe Ry.* v. *Dennis*, 224 U.S. 503, 506 (1912); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1870); *Norris* v. *Crocker*, 54 U.S. (13 How.) 429, 440 (1851), and cases cited therein.[28]

The Court of Appeals held that, because the several Trade and Intercourse Acts contained similar language, the 1793 statute should be treated as "essentially in force." 719 F.2d at 537. (Jt. App. at 231a.) In so ruling, the court flatly disregarded the pre-1871 abatement doctrine, which calls for a precisely opposite result. Furthermore, the court erroneously applied general rules

[28] Congress specifically reversed the common law abatement doctrine by statute in 1871. Act of February 25, 1871, 16 Stat. 432, now codified at 1 U.S.C. § 109. *See Warden* v. *Marrero*, 417 U.S. 653, 660 (1974). Because that statute operated only prospectively, however, it could not revive an action under the 1793 Trade and Intercourse Act that had already abated in 1799.

of statutory construction — designed to ascertain unclear legislative intent — in the face of an *express* statement by Congress that the prior statutes were repealed, with certain limited and *express* exceptions.[29]

1. *Implied Right of Action under the 1793 Act.*

The implied right of action claimed by the Oneidas is analogous to the right asserted in *Norris* v. *Crocker*, *supra*, 54 U.S. at 429. There, the owner of a fugitive slave brought a civil action for an alleged violation of the Fugitive Slave Act of 1793, which provided a private right of action against persons knowingly hindering the recovery of a fugitive slave. While the suit was pending below, however, Congress enacted a new statute, the Fugitive Slave Act of 1850. The Court first held that the 1850 act repealed the 1793 act by implication. It then held that "[a]s the plaintiff's right to recover depended entirely on the [1793] statute, its repeal deprived the court of jurisdiction" to hear the claim. 54 U.S. at 440. Thus, like *Norris*, this action involves a claimed civil cause of action for a violation of a repealed statute, and accordingly this action has abated.[30]

[29] The authority cited by the Court of Appeals is not to the contrary. In *Great Northern Ry.* v. *United States*, 155 F. 945, 953 (8th Cir. 1907), *aff'd*, 208 U.S. 452 (1908) the successor act only repealed "[a]ll laws and parts of laws *in conflict with* the provisions of this act . . . ." (emphasis added). The Eighth Circuit found that this repeal provision expressed "the extent to which it was intended to repeal prior laws, and exclude[d] any implication of a more extended repeal." *Id.* In the present case, both the repeal and the savings provisions expressly cover the rights claimed by the Oneidas. Furthermore, *Great Northern* post-dates the reversal of the common-law abatement doctrine in 1871. *See* text, *supra*, at n.28.

[30] *Townsship Co.* v. *Ardiffe*, 69 U.S. (2 Wall.) 430 (1864) does not command a different result. There, the Court held that a pilot's statutory right to one-half his pilotage fee in certain cases was not affected by the repeal and reenactment of the statute creating the right. The Court held that the right involved was a *quasi-contractual right* which the legislature did not intended to impair by repeal. 69 U.S. at 437-38. The present case, however, is one in which the plaintiffs are seeking to assert a remedy based on provisions of a penal statute which imposes disabilities. *See United States* v. *Black*, 73 F.2d 265, 266 (2d Cir. 1934) (explaining *Ardiffe*), *rev'd on other grounds*, 295 U.S. 480 (1935). Rather than creating a contractual right, the Trade and Intercourse Act actually limits such rights.

Under the abatement doctrine, Congress may expressly preserve rights arising under repealed statutes. *See Gulf, Colorado & Santa Fe Ry. v. Dennis*, *supra*, 224 U.S. at 506. Congress, however, chose not so do so: section 21 of the 1796 Act preserved only those "prosecutions and suits . . . that may have been *commenced*" under the 1793 Act. This action, of course, was not commenced until 1970, and thus was not preserved by Congress.

2. *Federal Common Law Right of Action.*

The Oneidas' common law claim is likewise extinguished by the abatement rule. That claim is grounded in the conclusion of the courts below that the 1793 Act provided that any conveyance made in violation of its provisions would be void *ab initio*. In fact, however, § 8 of the 1793 Act merely declared that such conveyances would be of no "validity in law or equity" — in other words, they would not be legally enforceable. At common law, where a statute did not render contracts violating it void, but simply removed all remedy for their enforcement, the contracts became enforceable after the repeal of the prohibitory statute. *See, e.g., Ewell v. Daggs*, 108 U.S. 143, 151 (1882); *Hewitt v. Wilcox*, 42 Mass. 154 (1840).

Moreover, the loss of the right to enforce a contract is a classic legal "disability." *See Doe v. Webster*, 606 F.2d 1226, 1233-34 (D.C. Cir. 1979); *Black's Law Dictionary* 415 (5th ed. 1974). The 1796 Act's repealer clause preserved only those "disabilities" which had "taken place" under the 1793 Act. 1796 Act, § 21. The 1799 Act, in turn, preserved only those disabilities which had taken place under the 1796 act, without preserving any others. 1799 Act, § 21.[9] Thus, any disability that may have arisen under the 1793 Act had long since abated by the time this action was filed in 1970, making the 1795 conveyance fully enforceable.[10]

[9] The 1802 Act contained no savings provisions whatsoever, and thus conclusively extinguished whatever rights or disabilities might have existed under the former statutes. *See* 1802 Act, § 22.

[10] This construction is consistent with the federal government's policy at the time — "to readily acquiesced in illegal settlements when they had gone so far as to be irremediable." Prucha, *supra*, at 100 — and explains the government's

III. The United States Subsequently Ratified the 1795 Conveyance to New York.

The United States may subsequently ratify, and thereby validate, transfers of land which might otherwise be invalid under the Trade and Intercourse Acts. *Seneca Nation v. United States*, 173 Ct.Cl. 912 (1965); *United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944); *Seneca Nation v. Christy*, 126 N.Y. 122, 146-47, 27 N.E. 275, 282 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896). *See also* 25 U.S.C. §§ 1712, 1723, 1744 (express retroactive ratification of Rhode Island, Maine, and Florida Indian land transfers).

Indeed, the United States may even subsequently ratify trespasses to Indian lands. *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) (unauthorized occupancy by the Arapahoe Indians of part of the Shoshone reservation); *United States v. Northern Paiute Nation*, 490 F.2d 954, 958 (Ct. Cl. 1974) (trespasses of miners onto Indian land). In *Shoshone Tribe*, the Court stated:

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy [by the Arapahoes] of the [Shoshone] Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of its beginning.

299 U.S. at 495.

The analysis for determining Congressional intent to ratify has two parts: first, the proper legal standard to be applied, and second, whether Congress intended such a ratification to occur.

longstanding refusal to open sales in Eastern states which violated the first four temporary Trade and Intercourse Acts. *See Mohegan Tribe v. Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

A. *Federal Ratification of Indian Land Conveyances Need Not be "Plain and Unambiguous," But May be Implied.*

It is well-settled that ratification may be implied from the subsequent acts and conduct of the federal government. In *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), this Court rejected the contention that a taking of Indian land by the New York State Power Authority "without the express and specific consent of Congress" violated 25 U.S.C. § 177, holding that Congressional consent could be inferred from the general terms of the Federal Power Act. 362 U.S. at 119, 123. Similarly, in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912, 915 (1965), the court held that a statute enacted by Congress almost seventy years after a transfer of Indian lands, which did not specifically approve the transfer in question, satisfied the requirements of the Trade and Intercourse Acts: "[t]his explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation [of the land]." In *United States* v. *National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944), an action brought by the United States on behalf of an Indian band to void two leases on reservation land, allegedly held by the defendant in violation of 25 U.S.C. § 177, the court found federal consent even without explicit congressional ratification.[34]

[34] As Judge Augustus Hand explained in *National Gypsum*:

> For many years it has been the *understanding* of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that *a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.*

141 F.2d at 863 (emphasis added).

The Court of Appeals, relying upon *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), held that Congressional ratification of a treaty extinguishing Indian title must be "plain and unambiguous." 719 F.2d at 539 (Jt.App. at 236a.) In *Santa Fe Pacific*, however, the Court construed the executive creation of a reservation for the Walapai Indians and an acceptance thereof by the tribe as an implied release of tribal rights in lands outside the reservation. 314 U.S. at 358. In other words, as explained in *Seneca Nation* v. *United States*, *supra*, 173 Ct.Cl. at 915, there need only be explicit recognition by the federal government of the transaction in issue in a manner that reveals the implicit approval thereof.

In summary, ratification need not be explicit to be effective. When it is not explicit, the intent of the government is controlling. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-87 (1977). That intent is to be determined from (a) the operative language of the statute or treaty, (b) legislative history, (c) the surrounding circumstances, and (d) the historical exercise of state or tribal jurisdiction over the territory. *See id.*, 430 U.S. at 587; *DeCoteau* v. *District County Court*, 420 U.S. 425, 442-46 (1975). If an examination of those factors indicates an intent to recognize the termination of Indian title, not even general presumptions favoring Indian tribes will dictate a contrary result. *See DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 444.[35]

B. *The 1795 Conveyance Was Impliedly Ratified by the United States.*

Less than three years after the 1795 conveyance, on June 1, 1798, the Oneida Nation and New York entered into a further treaty for the cession of land. Joseph Hopkinson, a United States commissioner, was present at the signing. (Jt. App. at 36a.) That treaty provided in part:

[35] In *Solem* v. *Bartlett*, 104 S.Ct. 1161, 1167, 79 L.Ed. 2d 443, 450-51 (1984), the Court stated that explicit language of cession by Congress was not required to diminish the boundaries of a reservation, but that circumstantial evidence, including "Congress' own treatment of the affected areas" would be considered in deciphering congressional intent.

> . . . [T]he said [Oneida] Indians do cede release and quit claim to the people of the State of New York forever all the lands within their reservation to the westward and southwestward of a line from the northeastern corner of *lot No. 54 in the last purchase from them* running northerly to a button wood tree . . . standing on the bank of the Oneida lake[.]

(*Id.*) (emphasis added). The "last purchase from them," clearly refers to the 1795 conveyance. Congress specifically ratified the 1798 treaty on February 13, 1799. 1 *Journal of the Executive Proceedings of the Senate* ("*Journal*") 312 (1828 ed.).

Three years later, on June 4, 1802, the Oneida Nation and the United States entered into another treaty. John Tayler was present as a United States agent. (Jt. App. at 38a.) The 1802 treaty provided in part that the Oneidas ceded:

> . . . All that certain tract of land beginning at the southwest corner of the land lying along the Genesee Road, and which was ceded in the year one thousand seven hundred and ninety-eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned tract easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of last mentioned tract, to *other lands heretofore ceded* by the said Oneida Nation of Indians to the People of the State of New York then along the same westerly to a part of said last mentioned land, called the Two-mile strip and thence along the same, northerly to the place of beginning[.]

(Jt. App. at 38a-39a.) (emphasis added). As shown on Plaintiff's Exhibit No. 7 at trial (Jt. App. at 41a), the "other lands heretofore ceded" were lands covered by the 1795 treaty. The Treaty of 1802, like its 1798 predecessor, was specifically ratified by Congress, on December 31, 1802. 1 *Journal*, *supra*, at 428.[36]

[36] Both treaties also make references to lots 54 and 59, each of which are part of the 1795 purchase according to the Surveyor General's plans of 1796. (Jt. App. at 142a-143a.)

The references to the 1795 transaction as a "purchase" and as covering "ceded" lands constitute explicit evidence that the federal government deemed that transaction effective to pass valid title. Had the government wished to convey a contrary message, or even a neutral position, it could easily have done so; for example, it could have identified the 1795 treaty by title without characterizing it (a standard conveyancing practice) or it could have repeated the 1795 metes and bounds descriptions for purposes of description. It did not do so, but rather chose to refer descriptively to the 1795 transfer as a "purchase" and a "cession."

In this regard, it is important to note that the United States did not have merely constructive notice of the 1795 purchase. The District Court specifically found that both Timothy Pickering, the Secretary of War, and Israel Chapin, Jr., the Superintendent of the Affairs of the Six Nations, were aware of the State's dealings with the Oneida Nation in 1795 and had tried on numerous occasions to prevent the tribe from conveying its land. 434 F.Supp. at 535. (Jt. App. at 56a-57a.) Against this background, it is very unlikely that the government's subsequent reference to the 1795 transaction as a "purchase" and a "cession" was casual, and that it did not intend to adopt the common legal meaning of those terms. *Cf. Solem* v. *Bartlett*, *supra*, 104 S.Ct. at 1166, 79 L.Ed.2d at 450 ("explicit reference to cession . . . strongly suggests" divestment of reservation lands).[37]

In addition, if the 1795 Treaty were not valid, Congress must be found to have sanctioned purchases of nonsensically circumscribed tracts of land. For example, the easternmost tract covered by the 1798 treaty was, at the time, abutted only by land covered by the 1795 Treaty. (Jt. App. at 41a.) If the latter treaty were invalid, that tract would be floating, unattached, in a sea of Oneida territory. Because "checkerboard jurisdiction" may create serious burdens for state and local governments, constructions leading to such a result are not favored. *See Solem* v. *Bartlett*, *supra*, 104 S.Ct. at 1167 n.12, 79 L.Ed.2d at 451 n.12.

[37] This construction is also consistent with the government's policy of acquiescing in illegal settlements once they had become irremediable. *See* text, *supra*, at 38, n.33.

The jurisdictional history and other circumstances surrounding the territory in question are also relevant. *See id.*, 104 S.Ct. at 1167, 79 L.Ed.2d at 451. New York has been exercising jurisdiction in an open and notorious manner over the subject land for nearly two centuries. This is not an isolated strip of land or a miscellaneous lot on the edge of a reservation; it is a large tract of land, crisscrossed by major highways and populated by thousands of persons. The treaty area is traversed by federally aided and designated highways, such as Interstate 90 and U.S. 20, and it contains federal post offices employing federal personnel. Neither the Department of the Interior, the Bureau of Indian Affairs, nor any other agency or department of the United States has ever considered the land to be Indian country. Rather, the United States government has treated the land as non-Indian land, fully subject to its jurisdiction and that of New York, for generations. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 603-05 (1976) (fact that neither Congress nor BIA sought to exercise authority, or challenge state's exercise of authority, over land that was more than 90% non-Indian is factor entitled to weight in determining congressional intent); *Northwestern Band of Shoshone Indians* v. *United States*, 324 U.S. 335, 346 (1945) (administration of territory by the United States "as though no Indian land titles were involved" was evidence that Congress did not intend to recognize Indian title).[36]

In summary, the acts and conduct of the United States subsequent to the 1795 conveyance show a clear intent to ratify that conveyance and to treat it as a valid purchase.

[36] *See also United States* v. *Gemmill*, 535 F.2d 1145, 1148-49 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976) (inclusion of land in national forest reserve indicated congressional intent to extinguish Indian title); *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1391-92 (Ct.Cl. 1975) (inclusion of land in national forest reserve and grazing district constituted extinguishment of Indian title); *Nooksack Tribe* v. *United States*, 162 Ct.Cl. 712, 715 (1963), *cert. denied*, 375 U.S. 993 (1964) (treatment as public land indicated congressional intent to extinguish Indian title). The court in *Gemmill* also held that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves . . . has been decisively resolved by congressional payment of compensation [under the Indian Claims Commission Act]." 535 F.2d at 1149. The Oneidas, as noted, voluntarily refused such compensation in order to attempt to gain a tactical advantage in this lawsuit. *See* text, *supra*, at n.7.

IV. The Oneidas' Claim Presents Solely Non-Justiciable Political Questions.

Perhaps the only point of agreement among the parties and the courts below is that this problem would be more properly addressed by Congress or the executive branch.[37] The Court of Appeals, however, rejected the contention that the claim presented a non-justiciable political question, treating it instead as if it were a commonplace land dispute between private parties. 719 F.2d at 538-39. (Jt.App. at 233a-235a.)

Under the principles set forth in *Baker* v. *Carr*, 369 U.S. 186 (1962), a political question is presented if, *inter alia*, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "an unusual need for unquestioning adherence to a political decision already made." *Id.* at 217. Both of these "analytical threads" catch this case. *Cf. id.* at 211.

A. *Determination of the Lawfulness of and Remedy for the Counties' Occupancy Has Been Committed Under the Constitution to Congress, which Has Expressly Delegated Sole Authority for that Determination to the President.*

The Constitution explicitly commits responsibility for the regulation of Indian affairs to Congress. U.S. Const. art. I, § 8. Congress, by treaty and by statute, has delegated *exclusive* civil remedial authority with respect to the unlawful occupancy of Oneida lands to the President. Thus, although the Trade and Intercourse Act of 1793 created judicial remedies, it created only criminal penalties. All other remedies, if any, were committed to Presidential discretion:

> And it shall, moreover, be lawful for the President . . . to take such measures, as he may judge necessary, to re-

[37] *See, e.g.*, 434 F.Supp. at 531-32 (Jt.App. at 48a-50a), and the brief in opposition to the petition for certiorari in No. 83-1065 submitted by the New York and Wisconsin Oneidas, at 20-23.

> move from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

1793 Act, § 5. *Cf.* 25 U.S.C. § 180 (the present-day analogue of § 5).

Article VII of the 1794 Treaty of Canandaigua contains an even broader delegation of remedial authority:

> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side . . . *complaint shall be made . . . [b]y the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature . . . of the United States shall make other equitable provision for the purpose.*

(emphasis added).

Thus Congress, pursuant to its constitutional authority, delegated the remedial authority for unlawful occupancy to the President. Congress "might, if [it] had deemed it most advisable to do so, have placed it in the power of a court to decide" when remedial measures were necessary, but it did not. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 43 (1849). Furthermore, when Congress delegates discretionary power to the President, the President is the "sole and exclusive judge" of the existence of the facts which call that discretion into play. *Id.* at 45.

The Oneidas presented their case at least twice to the President before filing this litigation; the President and his "Superintendent" made a considered decision to limit "government action on these claims" to the Indian Claims Commission, where the Oneidas had "a claim currently pending . . . for the very injuries . . . complained of." (Jt.App. at 42a-44a.) The judiciary is without the constitutional power to order further remedial measures.

B. *There Is an Unusual Need to Adhere to the Decision of the Political Branches to Remit the Oneidas to the Indian Claims Commission for Their Remedy.*

Both political branches have made a decision regarding the proper disposition of any claim by the Oneidas: Congress determined to delegate remedial power to presidential discretion, and the Executive determined that the claim should properly be resolved before the Indian Claims Commission. The disruption and chaos which this lawsuit promises is reason enough to adhere to that decision, but there is an additional reason why such adherence is necessary.

The Oneida Nation, as noted, has not existed for at least a century and a half. At present, a number of factions — at least two Oneida groups in New York, as well as Oneida groups in Wisconsin and Ontario and the so-called "Houdenosaunee" — are bitterly feuding as to which is the proper entity to succeed to the property rights of the Oneida Nation.[40] The Oneida factions are so intractably divided that the Department of the Interior has been unable to recognize a tribal governing body for years. *See Oneida Indian Nation of New York* v. *New York*, 520 F.Supp. 1278, 1285 n.6 (N.D.N.Y. 1981), *rev'd in part on other grounds*, 691 F.2d 1070 (2d Cir. 1982).[41]

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[40] Although respondents the Oneida of the Thames Band Council have represented to the courts below and to this Court in *this* case that *they* own the land in question, they are presently asserting in a related case pending below that the so-called "Houdenosaunee" own it. According to the Thames Oneidas in that action, title to the land in 1795 actually resided in the "Houdenosaunee," rather than in any individual tribe, under the "Great Law of the Houdenosaunee" or the "Gayanerakowa." *See Oneida Indian Nation of Wisconsin* v. *New York*, No. 83-7910, slip op. (2d Cir. April 5, 1984). In other words, the Thames Oneidas maintain that Indian law, *not* the law of the United States, controls the question of which entity has title to and sovereignty over the subject land. It is well-settled, however, that any dispute which depends upon an interpretation of Indian law for its resolution is not justiciable in the courts of the United States. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59-60 (1978).

Even if the "Six Nation Iroquois Confederacy" actually exists, there is some dispute as to whether the "Houdenosaunee" group properly represents it. *See Six Nations Confederacy* v. *Andrus*, 610 F.2d 996 (D.C.Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) (rival Six Nations groups disputing Indian Claims Commission award).

[41] One faction of the New York Oneidas has filed suit against the Secretary of the Interior in an attempt to force the government to recognize it as the true tribal entity. *Oneida Indian Nation of New York* v. *Clark*, No. 79-CV-652 (N.D.N.Y., filed Oct. 5, 1979).

The District Court recognized that, because of the conflicting claims of the various Oneida factions, it would be necessary to determine "the rights of the individual plaintiffs to share in a recovery . . . *another day*." 434 F.Supp. at 538 n.20 (emphasis added). (Jt.App. at 63a.) The court, however, could no more resolve that issue today than it could in 1977. The court cannot choose which entity is the proper tribal representative in the absence of recognition by the political branches, nor may it determine the distribution and allocation of tribal property. *See Baker* v. *Carr*, *supra*, 369 U.S. at 215; *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 83-85 (1977).[42] Neither Congress nor the Executive has resolved those questions. Thus, this case presents an extraordinary situation: although liability has been found, and damages have been assessed, neither the plaintiffs, the defendants, nor the court can determine who is to recover.

The payment of the damages in this action, moreover, is but the beginning. If the decision below is to be given any credence, the land at issue is properly Indian land, subject to the sovereign authority of a tribe. *See, e.g., Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982). The Counties do not merely "occupy" the roads, park, radio tower, and gravel bed at issue here; they maintain and operate them for the public benefit. Those facilities, and others such as hospitals, schools, and government offices, will now apparently come under the ownership and regulatory control of a different sovereignty. The "reestablishment" of a sovereign government after 200 years would be wrenching enough in the best of circumstances; here, however, no one even knows *which* sovereign government should be chosen. Thus, the effect of the decision below is to transfer the sovereignty of a large tract of land in the middle of New York State into limbo pending the outcome of a political decision committed solely to the coordinate branches.

A final judgment in this action, in the absence of a decision from the political branches on the tribal governance issues

[42] Even if the judiciary did elect to recognize one or more of the feuding Oneida factions, such an action might involve the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," *Baker* v. *Carr*, *supra*, 369 U.S. at 217, as the Department of the Interior could well elect to recognize another.

presented herein, would lead to nothing short of chaos. Accordingly, there is an unusual need for adherence to the political decision of Congress and the President to remit this claim to the Indian Claims Commission.

* * *

The overall context of the problem presented by this case deserves emphasis. It is difficult to believe that the court below genuinely expected that thousands of innocent persons would be forced to relinquish their homes and businesses as a result of its ruling; indeed, it is hard to imagine that any rational judicial system would permit the ultimate consequences of this judgment, and the further judgments it promises, to come to pass. The judgment entered below, therefore, likely never was intended to do justice standing by itself, but was designed to achieve some other goal.

The courts below, undoubtedly conscious of their proper role, made only guarded references to the likely real purpose. The Oneidas, however, have been quite candid: the *sole* purpose of the litigation, as they freely acknowledge, is *to prod Congress into legislating a settlement*. See, Brief of Oneida Indian Nation of Wisconsin and Oneida Indian Nation of New York in Opposition to Petitions for Certiorari, pp. 20-23. In other words, the federal courts have been drawn into a game of judicial brinksmanship, designed to provide the maximum possible leverage to the Oneidas in order to extract the most lucrative possible recovery.

Congress, however, has already legislated remedies for the Oneidas for the illegal occupancy of their lands. In effect, the landowners of Madison and Oneida Counties are being held hostage until Congress treats this problem in a manner that is more acceptable to the court than the manner in which Congress has chosen to treat it thus far. While federal courts are frequently called upon to deliver opinions that may have political implications, it is surely improper to engage a court in thinly-disguised political maneuverings for the sole purpose of attempting to exert pressure on Congress.

The motives of the courts were no doubt well-intentioned. Sympathy for the Oneida Nation of 1795, however, is not a proper basis for justice today and particularly not when so many innocent persons have so much at stake. *See Dennison*

v. *Topeka Chambers Ind. Dev. Corp.*, 527 F.Supp. 511, 626 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984). As Chief Judge Urbom observed in *United States* v. *Consolidated Wounded Knee Cases*, 389 F.Supp. 235 (D.Neb. and S.D. 1975), *aff'd*, 538 F.2d 770 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977):

> What precisely do we do now? Shall we pretend that history never was? . . . Feeling what *was* wrong does not describe what *is* right. Anguish about yesterday does not alone make wise answers for tomorrow. Somehow, all the achings of the soul must coalesce and with the wisdom of the mind develop a single national policy for governmental action.
>
> I feel no shirking of duty in saying that formulation of such a national policy should not be made by a federal judge or the handful who may review his decision on appeal.

389 F.Supp. at 238-239 (emphasis in original).

It is obvious — even to the Oneidas — that if any wrong has been committed here, the people of the United States as a whole are the proper source of redress. The Counties submit that it is improper, and unfair, to use the innocent landowners of Madison and Oneida Counties to force such a result.

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the Counties, should be reversed.

Respectfully submitted,

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June 15, 1984.

Addendum.

TRADE AND INTERCOURSE ACT OF 1790.

An Act to regulate trade and intercourse with the Indian tribes.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as now are, or hereafter shall be made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians without such license as aforesaid. No license shall be granted for a longer term than two years. Provided nevertheless, That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

Sec. 2. And be it further enacted, That the superintendent, or person issuing such license, shall have full power and authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken, immediately on the breach of any condition

in said bond: Provided always, That if it shall appear on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

Sec. 3. And be it further enacted, That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

Sec. 4. And be it enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Sec. 5. And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Sec. 6. And be it further enacted, That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning or bailing the offender, as the case

may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

Sec. 7. And be it further enacted, That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

Approved, July 22, 1790.

TRADE AND INTERCOURSE ACT OF 1793

An Act to regulate Trade and Intercourse with the Indian Tribes.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Sec. 2. And be it further enacted, That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

Sec. 3. And be it further enacted, That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful

license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: Provided, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Sec. 4. And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Sec. 5. And be it further enacted, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

Sec. 6. And be it further enacted, That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this Act: Provided also, That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Sec. 7. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the

discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Sec. 8. And be it further enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 9. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: Provided, That the whole amount of such presents, and allowance to agents, shall not exceed twenty thousand dollars per annum.

Sec. 10. And be it further enacted, That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

Sec. 11. And be it further enacted, That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be

brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Sec. 12. And be it further enacted, That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Sec. 13. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Sec. 14. And be it further enacted, That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

Sec. 15. And be it further enacted, That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

APPROVED, March 1, 1793.

TRADE AND INTERCOURSE ACT OF 1796

An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork, stood Laromie's store, and where commences the portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence easterly on the said ridge, to a point, from whence, a southwest line will strike the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses

the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch; thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which divides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen, or other person, shall go into any country, which is allotted, or

secured by treaty as aforesaid to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person, as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States,

to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States, to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon: And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender without any other or further proceeding.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or huntingcamps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond, with one or more sureties, ap-

proved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit, such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act:

and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horse for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian

nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen, or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that

purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: And, in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, and eventual indemnification: Provided always, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen, or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial,

shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer, to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such district have in their ordinary sessions: And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district, in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States, to apprehend every person, who shall, or may be found in the Indian country, over and beyond the said boundary line, between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against, in due course of law: Provided, that no person, apprehended by military force, as aforesaid, shall be detained longer than ten days, after the arrest, and before removal.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half to the use of the United States: Except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized, to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That all and every other act and acts, coming within the purview of this act, shall be, and they are hereby repealed: Provided, nevertheless, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Sec. 22. And be it further enacted, That this act shall be in force, for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

APPROVED, May 19, 1796.

TRADE AND INTERCOURSE ACT OF 1799.

An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that branch, to the crossing place above Fort Laurence; thence, westwardly to a fork of that branch of the Great Miami river running into the Ohio, at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westwardly course to Fort Recovery, which stands on a branch of the Wabash; thence southwestwardly, in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucky or Cuttawa river; thence down

the said river Ohio, to the tract of one hundred and fifty thousand acres near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence southeastwardly on the said ridge, to a point, from whence a southwest line will strike the mouth of Duck river; thence still eastwardly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses the same; thence to the Cumberland mountain, at the point of Campbell's line; thence in a southwestwardly direction along the foot of the Cumberland mountains, to Emory's river; thence down the same to its junction with the river Clinch; thence down the river Clinch to Hawkins's line; thence along the same to a white oak, marked one mile tree; thence south fifty-one degrees west, three hundred and twenty-eight chains to a large ash tree on the bank of the river Tennessee, one mile below southwest point; thence up the northeast margin of the river Tennessee (not including islands) to the Wild Cat Rock below Tellico block-house; thence in a direct line to the Militia spring near the Maryville road, leading from Tellico; thence from the said spring to the Chilhowee mountain, by a line so to be run, as will leave all the farms on Nine-mile creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence along the said line to the Great Iron mountain; and from the top of which, a line to be continued in a southeastwardly course to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course to Tugaloo river; thence in a direct line to the top of Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee,

which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's: Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner, as said provisions apply by force of this act to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in anywise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen, or other person, shall go into any country, which is allotted or secured by treaty, as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such of-

fender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed. And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon. And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory

belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes. And the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations, or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting

skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law

or equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided, nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that

purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury; and in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guaranty to the party injured, an eventual indemnification: Provided always, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had

been committed within the bounds of their respective districts. And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding. And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such district have in their ordinary sessions. And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States, to apprehend every person who shall or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: Provided, that no person, apprehended by

military force, as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers, who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court-martial shall direct. Provided, that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed in the discretion of the court, before whom the trial shall be had, and that all fines and forfeitures, which shall

accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States: except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement (so called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That this act shall be in force from and after the third day of March, one thousand seven hundred and ninety-nine, and shall continue in force the term of three years; and so far as respects the proceedings under this act, it is to be understood, that the act, intituled "An act to amend an act, intituled An act giving effect to the laws of the United States within the district of Tennessee," is not to operate. And all disabilities which have taken place shall continue and remain; and all penalties and forfeitures, that have been incurred, may be recovered, and all prosecution

and suits which may have been commenced, may be prosecuted to final judgment, under the act, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers; which act expires, by its own limitation, on the third day of March, one thousand seven hundred and ninety-nine, in the same manner, as if the said act was continued in force.

APPROVED, March 3, 1799.

TRADE AND INTERCOURSE ACT OF 1802.

An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in all such places as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that branch, to the crossing place above Fort Laurence; thence westwardly to a fork of that branch of the Great Miami river running into the Ohio, at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and St. Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westwardly course to Fort Recovery, which stands on a branch of the Wabash; thence southwestwardly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same to a point

opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence southeastwardly on the said ridge, to a point, from whence a southwest line will strike the mouth of Duck river; thence, still eastwardly on the said ridge, to a point forty miles above Nashville; thence northeast to Cumberland river; thence up to the said river to where the Kentucky road crosses the same; thence to the Cumberland mountain, at the point of Campbell's line; thence in a southwestwardly direction along the foot of the Cumberland mountain to Emory's river; thence down the same as to its junction with the river Clinch; thence down the river Clinch to Hawkins's line; thence along the same to a white oak, marked one mile tree; thence south fifty-one degrees west, three hundred and twenty-eight chains, to a large ash tree on the bank of the river Tennessee, one mile below southwest point; thence up the northeast margin of the river Tennessee (not including islands) to the Wild Cat Rock, below Tellico block-house; thence in a direct line to the Militia spring, near the Maryville road leading from Tellico; thence from the said spring to the Chilhowee mountain by a line so to be run as will leave all the farms on Nine Mile creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence along the said line to the great Iron mountain; and from the top of which a line to be continued in a southeastwardly course to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence along the South Carolina Indian boundary to and over the Ocunna mountain, in a southwest course to Tugaloo river; thence in a direct line to the top of Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river St. Mary's: Provided always, that if the boundary line between the said Indian tribes and the United States shall, at any time hereafter, be varied, by any treaty

which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner as said provisions apply, by force of this act, to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen or other person, shall go into any country which is allotted, or secured by treaty as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States, commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States: or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the prop-

erty so taken or destroyed: and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands belonging or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make a settlement thereon.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians, in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, to such trader, who shall enter into bond with one

or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations, or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen or other person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the

superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid: describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse to or from any Indian, excepting for and on account of the United States; and any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the

same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: and in the mean time, in respect to the property so taken, stolen or destroyed, the United States guarantee to the

party injured, an eventual indemnification: Provided always, that if such injured party, his representative, attorney or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts; and in all cases where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: and in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such districts have in their ordinary

sessions; and when the offender shall be apprehended, or brought for trial into any of the United States, except Kentucky or Tennessee, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner as such circuit court might or could do. And the district courts of Kentucky, Tennessee and Maine shall have jurisdiction of all crimes, offences and misdeamors committed against this act, and shall proceed to trial and judgment in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States to apprehend every person who shall, or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest, convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: Provided, that no person, apprehended by military force as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court martial shall direct: Provided, that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby

authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States; in which case the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and

of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river, (so called,) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized to cause to be clearly ascertained and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That the President of the United States be authorized to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding.

Sec. 22. And be it further enacted, That this act shall be in force from the passage thereof; and so far as respects the proceedings under this act, it is to be understood, that the act, intituled "An act to amend an act, intituled An act giving effect to the laws of the United States within the district of Tennessee," is not to operate.

Approved, March 30, 1802.

TITLE 25, UNITED STATES CODE § 177

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

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§ 180. Settling on or surveying lands belonging to Indians by treaty

Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands.

TITLE 28, UNITED STATES CODE § 2415

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable

administrative proceedings required by contract or by law, whichever is later: Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: Provided further, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: Provided further, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: Provided, That an action to recover damages resulting from a trespass on lands of the United States:

an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

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(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

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TREATY OF CANANDAIGUA, NOVEMBER 11, 1794, 7 STAT. 44

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

Article I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

Article II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

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Article IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

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Article VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations: and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers,

who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

Article VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four. [There follows a series of signatures.]

TREATY OF SEPTEMBER 15, 1795

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread, Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto

the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittlingo Branch of Canaseraga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at

the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North

one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said

State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained n the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith or part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

[There follows a series of signatures.]

TREATY OF JUNE 1, 1798

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York .....

The said Indians having in the month of March last Proposed to the Goveronor [sic] of the said State to cede the Lands herein after described, for the compensation herein after mentioned — and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newagaghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation — And also the same Breadth for the distance of three miles

on the south side and of one mile on the north side of the said Road Eastward to commence at the Eastern Boundary of the said Lot No. 54, Provided and excepted nevertheless that the following Indian Families Viz: Sarah Dockstader, Jacob Dockstader, Cornelius Dockstader Lewis Denny John Denny, Jan Joost and Nicholas shall be suffered to possess of the Tract First above mentioned. The Grounds cultivated by them respectively and their improvements not exceeding Fifty Acres to each Family so long as they shall reside there — And in consideration of this Proviso and Exception the said Indians do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows— that is to say Beginning in the South east Corner of Lot No. 59, in the said last Purchase and running thence East one Mile, thence North two Miles thence West One Mile and thence South Two Miles shall be considered as set Apart by the said Nation or Tribe for the use of the said Families whenever they shall remove from where they now reside, The Said Agents do for the People of the said State pay to the said Indians in addition to the said sum of Three Hundred dollars already advanced to them as above mentioned the further sum of Two Hundred Dollars, And do grant to the said Indians that the People of the said State shall pay to the said Indians at their said Village on the First day of June next and on the first day of June Yearly thereafter the Annual Sum of Seven Hundred Dollars.

In Testimony whereof the said Commissioner, the said Agents and the said Indians have hereunto and to other Acts of the same Tenor and date the One to remain with the United States another to remain with the State of New York and another to remain with the said Indians set their hands and Seals at the Village Aforesaid the Day and Year first above written.

[There follows a series of signatures.]

TREATY OF JUNE 4, 1802

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York, on the fourth day of June in the year of our Lord One Thousand eight Hundred and Two

Present John Taylor Agent appointed under the authority of the United States to hold the Treaty, and Ezra L'Hommedieu and Simeon DeWitt Agents for the State of New York.

The said Indians having by their Sachems Chiefs and Warriors in the month of March last proposed to the Governor of the said State to cede the Lands hereinafter described for the compensation hereinafter mentioned And the said Governor together with the Surveyor General of the said State and Ezra L'Hommedieu Esquire an Agent appointed by the said Governor pursuant to concurrent resolutions of the Senate and Assembly of the State bearing date the 23d and 24 days of February last, having acceded to the proposal of the said Sachems Chiefs and Warriors, and on the fifth day of the said month of March executed a provisional agreement with them for the cession and purchase of the same, and advanced to them at their desire in part payment of the said Compensation three Hundred dollars, to answer the immediate Occasions of the said Indians — The said Cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty which hath on the request of the said Governor been appointed to be held for the purpose, as follows, that is to say, The said Indians do Cede release and quit claim to the people of the State of New York forever the several Tracts or parcels of Land hereinafter described, being parts of the lands heretofore reserved to the said Oneida Nation of Indians To wit, All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred

and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York then along the same westerly to a part of said last mentioned Land called the Two-mile strip, and then along the same northerly to the place of Beginning — Also, another Tract of Land bounded on the south by the Genesee Road, on the North by a Line drawn parallel to said Road — and at the Distance on an average of half a mile to the northward thereof, and extending from the West bounds of a tract of One hundred Acres now ceded and including Myndert Van Eps Wempies house westerly to the Lands heretofore ceded as aforesaid. Provided that the north bounds of the last described tract shall be run with such right Angular offsets as to leave the Indian Houses near the northwesterly corner of said Tract, Twenty chains distant from the same — Also, One Hundred Acres to be laid out in a square and to extend each way from the house of said Myndert Van Eps Wempie along the said Genesee Road fifteen chains and northerly from said Road fourteen chains and Southerly from said road twenty chains Also all that part of the land heretofore reserved by the said Oneida nation of Indians along the Fish Creek which lies to the northward of the Bridge over said Creek commonly called and known by the name of Bloomfields Bridge. The said Agents do for the people of the State of New York in conformity to the said provisional agreement pay to the said Indians in addition to the said sum of Three Hundred Dollars already advanced to them as above mentioned the further sum of Six Hundred Dollars, and do grant to the said Indians that the People of the said State shall annually forever hereafter on such day and place as are or shall be appointed for the Pay-

ment of other Annuities to the said Indians pay to the said Indians the sum of Three hundred Dollars. And the said Agents do further grant to the said Indians that the People of the State of New York, out of the lands above described and hereby ceded to them shall grant to Sarah Dockstader One Hundred Acres to be laid out in a square adjoining the Two-Mile Tract, on the Road commonly called Klocks, Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life and thereafter to her heirs in fee. And ALSO to Michael Kern One Hundred and fifty Acres, so as to include the House in which he now resides with the other improvements made by him around the Same.

In Testimony whereof the said commissioner the said Agents and the said Indians have hereunto and to other Acts of the same tenor and date the one to remain with the United States another to remain with the State of New York and another to remain with the said Indians, set their hands and seals at the Village aforesaid the day and year first above written.

[There follows a series of signatures.]

JOINT

APPENDIX

Nos. 83-1065, 83-1240

In the
Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, ET AL.,

v.

THE ONEIDA INDIAN NATION OF
NEW YORK STATE, ET AL.

THE STATE OF NEW YORK

v.

THE ONEIDA INDIAN NATION OF
NEW YORK STATE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOINT APPENDIX

[List of Counsel on Inside Cover]

PETITION FOR CERTIORARI IN NO. 83-1065
FILED DECEMBER 28, 1983
PETITION FOR CERTIORARI IN NO. 83-1240
FILED JANUARY 25, 1983
CERTIORARI GRANTED MARCH 19, 1984

BEST AVAILABLE COPY

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Chronological List of Relevant Docket Entries.

February 5, 1970 — Complaint of Oneida Indian Nation of New York and Oneida Indian Nation of Wisconsin filed in U.S. District Court for Northern District of New York.

July 29, 1970 — Amended Complaint of Oneida Indian Nation of New York and Oneida Indian Nation of Wisconsin.

November 12, 1970 — Notice of defendants' motion to dismiss filed.

November 18, 1970 — Notice of motion and motion to dismiss filed.

November 11, 1971 — Memorandum-Decision and Order of Judge Port on motions for summary judgment dismissing complaint filed.

September 21, 1972 — Certified copy of judgment of Circuit Court of Appeals affirming order and judgment of district court.

January 21, 1974 — Decision of Supreme Court of United States reversing dismissal of action filed.

May 20, 1974 — Decision of Second Circuit Court of Appeals remanding case to the district court filed.

June 4, 1974 — Order on mandate vacating order dismissing complaint and reinstating amended complaint filed.

October 24, 1974 — Answer of defendant County of Oneida filed.

October 24, 1974 — Third-party complaint against the State of New York by the County of Oneida filed.

November 15, 1974 — Third-party complaint against the State of New York by the County of Madison filed.

September 26, 1975 — Answer and affirmative defense of County of Madison filed.

November 12, 1975 — Trial on liability issues commenced.

November 13, 1975 — Motion to add Oneida of the Thames Band Council as a party plaintiff allowed.

July 12, 1977 — Memorandum-Decision and Order of Judge Port finding liability against the defendant Counties of Madison and Oneida filed.

April 30, 1979 — Notice of motion of defendant County of Madison for summary judgment filed.

May 17, 1979 — Order of Judge Port denying motion for summary judgment filed.

October 3, 1979 — Certified copy of Decision of Circuit Court of Appeals granting motion for leave to appeal pursuant to 28 U.S.C. § 1292(b) filed.

March 24, 1980 — Decision of Circuit Court of Appeals filed.

February 5, 1981 — Pre-trial memorandum of the Counties of Madison and Oneida, New York, on the issue of remedies filed.

February 27, 1981 — Plaintiff's motion to strike portions of defendants' pre-trial memorandum filed.

March 4, 1981 — Order of Judge Port (3/2/81) striking a portion of the defendants' pre-trial memorandum and treating it as the denial of a motion to dismiss filed.

March 12, 1981 — Objection of defendants to order of Court striking portion of pre-trial memorandum and denying it as a motion to dismiss.

May 20, 1981 — Order of Judge Port (5/18/81) that the political question doctrine does not preclude the fashioning of a remedy filed.

September 14, 1981 — Trial on damages issues commenced.

September 28, 1981 — Defendants' Motion to dismiss and motion for summary judgment filed.

October 5, 1981 — Decision of Judge Port denying motion to dismiss filed.

October 5, 1981 — Partial findings of fact and conclusions of law filed.

October 5, 1981 — Order of Judge Port awarding damages to the plaintiffs against the County of Madison in the sum of $9,060 with interest at 6% per annum from January 1, 1968, and judgment in favor of the plaintiffs against the defendant County of Oneida in the sum of $7,634 with interest at 6% per annum from January 1, 1968 filed.

October 28, 1981 — Notice of appeal of the Counties of Madison and Oneida filed.

March 5, 1982 — Motion of the State of New York to dismiss third-party complaints of Counties of Madison and Oneida, New York, filed.

March 9, 1982 — Motion for summary judgment on the third-party complaints against the State of New York by the Counties of Madison and Oneida, New York, filed.

March 31, 1982 — Certified copy of Circuit Court of Appeals order remanding action to district court filed.

May 5, 1982 — Order of Judge Port denying motion of third-party defendant State of New York to dismiss third-party complaints and granting motion of third-party plaintiffs for summary judgment against the State of New York filed.

May 19, 1982 — Judgment on third-party complaints against the State of New York by the Counties of Madison and Oneida, New York, to the effect that the Counties are awarded judgment against the State of New York for any portion of the plaintiffs' recovery herein directed or awarded, including any interest thereon, that is paid by either or both of the Counties, together with interest at the rate of 6% per annum from the date of any such payment.

May 21, 1982 — Notice of appeal by State of New York filed.

June 14, 1982 — Notice of appeal of the Counties of Madison and Oneida, New York, filed.

September 29, 1983 — Opinion of the Court of Appeals for the Second Circuit, filed.

COMPLAINT, Filed 2-5-70.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs, for their complaint against defendants, allege and show that:

1. Plaintiff, THE ONEIDA INDIAN NATION OF NEW YORK STATE, is an Indian Nation or Tribe with its principal Reservation and situs in the Counties of Oneida and Madison, State of New York. Plaintiff, THE ONEIDA INDIAN NATION OF WISCONSIN, is an incorporated Indian Nation or Tribe with its principal Reservation and situs in the State of Wisconsin. Defendants are Counties of the State of New York.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is conferred by diversity of citizenship.

3. From time immemorial, down to the time of the American Revolutionary War, the plaintiffs owned some 6,000,000 acres of land in New York State, as shown on the map annexed as Exhibit A. In the American Revolutionary War, the plaintiffs fought on the side of the Thirteen Colonies and rendered valuable and material support, which helped the Colonies attain victory and independence.

4. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article IX of the Articles of Confederation and under Article I, Section 8, of the United States Constitution. Under this power, treaties were made with the Oneidas, which read in part as follows:

Treaty with Six Nations — Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations — Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations — Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property, and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries

done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

Treaty with Oneida, Tuscarora and Stockbridge Indians — Oneida 1974

"Whereas, In the late war between Great Britain and the United States of American, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

5. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 U.S.C.A. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

"Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Here well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

"The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

6. Plaintiffs hereby invoke Section 177 of the Federal Law, Title 25 U.S. Code, which reads as follows:

"Section 177. Purchases or Grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claims to land within such State, which shall be extinguished by treaty. R.S. Section 2116."

7. Plaintiffs hereby invoke Section 194 of the Federal Indian Law, Title 25 U.S. Code, which reads as follows:

"Section 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. Section 2126."

8. In the so-called "Treaty" at Fort Stanwix in 1788, the plaintiffs purportedly ceded most of their lands (over 5,000,000 acres) to the State of New York, their former ally, for a consideration of $5500 plus an annuity of $600 per year forever. Reserved from this cession was a tract of land of about 300,000 acres located in what is now denoted the Counties of Oneida and Madison. Such tract is herein called plaintiffs' "Reservation" or "the Reservation" and is described in paragraph Second of said Treaty. A copy of the 1788 treaty is annexed to and made a part of this complaint as Exhibit "B".

9. The Reservation was still intact in 1790, at the time of enactment of the "Indian Non-Intercourse Act" (1 Stat. 137 (1790), similar in intent to Section 177 of 25 U.S.C.A.), which expressly forbade and declared invalid any sale of Indian Reservations without the consent of the United States.

10. In the year 1795 representatives of New York State met with representatives of plaintiffs and concluded another "Treaty" whereby plaintiffs purportedly deeded to the State a large portion of the Reservation. Exhibit "C", annexed, is a copy of said "Treaty" and contains a description of the lands purportedly deeded to the State. It is the lands described in Exhibit C which are the subject of this action, hereinafter called the "premises".

11. All of the Indians, representatives of plaintiffs, who signed the said "Treaty" of 1795 (herein the "Treaty") signed with an

"X", in place of a signature indicating, on information and belief, that they could not read or write.

12. At the time of making of said "Treaty" of 1795, the federal law forbidding sale of Indian lands without consent of the United States was in full force and effect, and the premises were lands subject to such law. See 1 Stat. 329 (1793). No federal consent, on information and belief, was ever obtained to such purported deed to the State. On information and belief, no U.S. Commissioner was present at the negotiations or the execution of such purported "Treaty". On information and belief, the U.S. has never approved or ratified such purported "Treaty", and the purported transfer is invalid under federal law.

13. On information and belief, the consideration to be paid to plaintiffs under such "Treaty" was based on a perpetual annuity of Three Dollars a year for every hundred acres (3 cents per year per acre), which computed at 6% amounts to a principal price of fifty cents per acre.

14. In the period 1792-1795, the Holland Land Company through its agent, John Lincklaen of Cazenovia, was selling nearby land (just south of the premises) at from $1.50 to $4.00 per acre unimproved. From 1795 to the early 1800's, nearby land was sold to settlers at $4.00, $5.00 and $6.00 per acre.

15. The lands (the premises) purchased for $0.50 per acre from plaintiffs in 1795 were sold off in 1797 to settlers and developers for a consideration fixed by state law at $3.53-1/2 per acre. This represented a profit to the state of $3.03-1/2 per acre on the premises, a 500% profit in two years.

16. On information and belief, the representatives of New York State misrepresented to plaintiffs the value of their land and induced them to sell it for an unconscionable and inadequate price.

17. New York State also knew and admitted that federal law forbade such land acquisitions, since it recognized the need for U.S. consent in connection with a further land purchase from plaintiffs in 1798 and in connection with four other acquisitions of Indian lands from 1797-1802.

18. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded became the property of the Counties of Oneida

and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of said occupancy plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least $10,000, exclusive of costs and interest.

19. By bringing this action, plaintiffs do not waive or relinquish any right or action in respect of its lands in New York State as shown on Exhibit A.

20. Both the federal and state treaties provide that the Oneida Indians are to ask the help of the United States and the State before taking any action on their own. The plaintiffs have asked the help of both the federal and state governments and such help has been refused.

21. It has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors. The plaintiffs bring this action against defendants only because all other avenues of redress have been closed to them.

Wherefore, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By _____

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AMENDED COMPLAINT, Filed 7-29-70.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs hereby amend their complaint in the above entitled action and allege and show as and for an alternate, separate, and distinct cause of action a new paragraph, "22", as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair

rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just.

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ANSWER OF DEFENDANT COUNTY OF ONEIDA.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Answer and Affirmative Defense.

Defendant, County of Oneida, New York, as and for an Answer to the Complaint of the plaintiffs, herein states:

1. Defendant lacks knowledge sufficient to form a belief as to the allegations contained in paragraphs "1", "3", "5", "8", "9", "10", "11", "12", "13", "14", "15", "16", "17", "18", "20" and "21" of the complaint, as amended.

2. DENIES the allegations contained in paragraphs "2", "6", "19" and "22" of the complaint, as amended.

3. As to the invocations set forth in paragraph "4" of the amended complaint, defendant lacks knowledge sufficient to form

a belief as to the allegations, except that the County of Oneida admits, upon information and belief, that the treaties, mentioned in the said paragraph, were entered into as therein alleged.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

4. The cause of action herein accrued more than six years prior to the commencement of this action and is therefore barred by the statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

5. Plaintiffs had notice of all of the facts and all of the acts of the defendant set forth in the complaint since 1795 but nevertheless refrained from commencing this action until 1970 so that the plaintiffs are guilty of such laches as should in equity bar the plaintiffs from maintaining this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

6. The defendant, County of Oneida, has acquired title to the premises involved herein by adverse possession.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

7. The defendant County of Oneida is a bona fide purchaser for value of said premises without notice of any adverse rights of others.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

8. None of the acts set forth in the complaint which form the basis of the action were committed by defendant, County of Oneida, and accordingly, it is not subject to liability in this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

9. The plaintiffs at the times mentioned in the complaint did not own a fee title to the said premises since title was then vested in the State of New York by virtue of its status as a sovereign state. The plaintiffs had a right of occupancy only and, therefore, the price paid under the treaty for the purchase of such rights was adequate in the premises.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

10. The plaintiffs could have asserted the claims now being made for the past 179 years since the Supreme Court found jurisdiction based on a Federal treaty; plaintiffs, instead, appear to have abandoned the lands in question, and, at the very least, have slept on their rights.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA ALLEGES:

11. That this issue is presently before the United States Indian Claims Commission.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

12. The County of Oneida, as a political division of the State of New York has not waived its immunity from suit.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

13. There is no enabling act passed by the Legislature which permits this action to be maintained by the plaintiffs.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA ALLEGES:

14. The plaintiffs have not complied with the requirements of the County Law and General Municipal Law of the State of New York as to the requirements of giving notice of claim and commencing an action thereon within one year and 90 days after the event upon which the claim is based.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

15. The plaintiffs' Indian tribes are not competent to sue in Federal Courts or in any Court since under the laws of the United States of America they can do so only through suit instituted in their behalf by the United States Government.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

16. Defendant, County of Oneida, is not a proper party to defend this action.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

17. This action is premature in that the plaintiffs have failed to exhaust the remedies which they are required to pursue before being entitled to institute the present action.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

18. That the plaintiffs have failed to join all the parties who have an interest in this proceeding and whose presence is necessary in order that any judgment entered herein would dispose of all the issues and be binding and effective.

WHEREFORE, defendant, County of Oneida, demands judgment dismissing the amended complaint of the plaintiffs, together with costs and disbursements of this action.

DONALD E. KEINZ, County Attorney
Rocco S. Mascaro, of Counsel
Attorneys for Defendant,
County of Oneida
Office and P.O. Address:
800 Park Avenue
Utica, New York 13501
Tel: (315) 798-5910

THIRD PARTY COMPLAINT OF COUNTY OF ONEIDA

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

COUNTY OF ONEIDA, NEW YORK,

Defendant and
Third Party Plaintiff,

-vs-

STATE OF NEW YORK,

Third Party Defendant.

Index No. 70-CV-35

Third Party Complaint

Defendant, County of Oneida, as and for its third party complaint, against the State of New York, alleges as follows:

1. The County of Oneida is a municipal corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 800 Park Avenue, Utica, New York.

2. The State of New York is a sovereign state and conducts its business through the various political sub-divisions of the State of New York, including the County of Oneida.

3. Plaintiffs' allege in their complaint that the State of New York purchased from plaintiffs, contrary to Federal law, 300,000 acres of land, part of which lands are situate in the County of Oneida.

4. It is further alleged in the complaint herein that a portion of the land so purchased by the State of New York was subsequently ceded to the County of Oneida by the State of New York.

5. That if in fact such land was ceded, given, transferred or otherwise entrusted to the County of Oneida by the State of New York, it was done solely for the benefit of the State of New York in furtherance of the sovereign powers and interests of the State of New York, to be administrated by its agent, the County of Oneida, pursuant to the laws of the State of New York.

6. If the defendant, County of Oneida, is held responsible for the damages sustained by the plaintiffs herein such liability shall have been brought about and caused wholly and solely by the State of New York, its agents, servants and employees without any fault or liability of the defendant, County of Oneida, in any manner whatsoever.

WHEREFORE, defendant and third party plaintiff demands judgment against the third party defendant for any amounts re-

covered against it by the plaintiffs, together with the costs and disbursements of this action.

DONALD E. KEINZ, County Attorney
James P. O'Rourke, of Counsel
Rocco S. Mascaro, of Counsel
Attorney for Defendant and
Third Party Plaintiff
Office & P.O. Address:
800 Park Avenue
Utica, New York 13501
Tel: (315) 798-5910

THIRD PARTY COMPLAINT OF COUNTY OF MADISON

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Index No. 70-CV-35

Third Party Complaint

Defendant, County of Madison, as and for its third party complaint, against the State of New York, alleges as follows:

1. The County of Madison is a municipal corporation organized and existing under the laws of the State of New York with its principal office and place of business located at Madison County Office Building, Wampsville, New York.

2. The State of New York is a sovereign state and conducts its business through the various political sub-divisions of the State of New York, including the County of Madison.

3. Plaintiffs' allege in their complaint that the State of New York purchased from plaintiffs, contrary to Federal law, 300,000 acres of land, part of which lands are situate in the County of Madison.

4. It is further alleged in the complaint herein that a portion of the land so purchased by the State of New York was subsequently ceded to the County of Madison by the State of New York.

5. That if in fact such land was ceded, given, transferred or otherwise entrusted to the County of Madison by the State of New York, it was done solely for the benefit of the State of New York in furtherance of the sovereign powers and interests of the State of New York, to be administrated by its agent, the County of Madison, pursuant to the laws of the State of New York.

6. If the defendant, County of Madison, is held responsible for the damages sustained by the plaintiffs herein such liability shall have been brought about and caused wholly and solely by the State of New York, its agents, servants and employees without any fault or liability of the defendant, County of Madison, in any manner whatsoever.

WHEREFORE, defendant and third party plaintiff demands judgment against the third party defendant for any amounts recovered against it by the plaintiffs, together with the costs and disbursements of this action.

WILLIAM L. BURKE, ESQ.
County Attorney
Attorney for Defendant and
Third Party Plaintiff
Office & P.O. Address:
29 Lebanon Street
Hamilton, New York 13346
Tel. (315) 824-3550

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK.

Defendants.

Civil Action No. 70-CV-35

Answer and Affirmative Defense.

Defendant, County of Madison, New York, as and for an Answer to the Complaint of the plaintiffs, herein states:

1. Defendant lacks knowledge sufficient to form a belief as to the allegations contained in paragraphs "1", "3", "5", "8", "9", "10", "11", "12", "13", "14", "15", "16", "17", "18", "20" and "21" of the complaint, as amended.

2. DENIES the allegations contained in paragraphs "2", "6", "19" and "22" of the complaint, as amended.

3. As to the invocations set forth in paragraph "4" of the amended complaint, defendant lacks knowledge sufficient to form a belief as to the allegations, except that the County of Madison

admits, upon information and belief, that the treaties, mentioned in the said paragraph, were entered into as therein alleged.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

4. The cause of action herein accrued more than six years prior to the commencement of this action and is therefore barred by the statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

5. Plaintiffs had notice of all of the facts and all of the acts of the defendant set forth in the complaint since 1795 but nevertheless refrained from commencing this action until 1970 so that the plaintiffs are guilty of such laches as should in equity bar the plaintiffs from maintaining this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

6. The defendant, County of Madison, has acquired title to the premises involved herein by adverse possession.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

7. The defendant County of Madison is a bona fide purchaser for value of said premises without notice of any adverse rights of others.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

8. None of the acts set forth in the complaint which form the basis of the action were committed by defendant, County of Madison, and accordingly, it is not subject to liability in this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

9. The plaintiffs at the times mentioned in the complaint did not own a fee title to the said premises since title was then vested in the State of New York by virtue of its status as a sovereign state. The plaintiffs had a right of occupancy only and, therefore, the price paid under the treaty for the purchase of such rights was adequate in the premises.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

10. The plaintiffs could have asserted the claims now being made for the past 179 years since the Supreme Court found jurisdiction based on a Federal treaty; plaintiffs, instead, appear to have abandoned the lands in question, and, at the very least, have slept on their rights.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

11. That this issue is presently before the United States Indian Claims Commission.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

12. The County of Madison, as a political division of the State of New York has not waived its immunity from suit.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

13. There is no enabling act passed by the Legislature which permits this action to be maintained by the plaintiffs.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

14. The plaintiffs have not complied with the requirements of the County Law and General Municipal Law of the State of New York as to the requirements of giving notice of claim and commencing an action thereon within one year and 90 days after the event upon which the claim is based.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

15. The plaintiffs' Indian tribes are not competent to sue in Federal Courts or in any Court since under the laws of the United States of America they can do so only through suit instituted in their behalf by the United States Government.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

16. Defendant, County of Madison, is not a proper party to defend this action.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

17. This action is premature in that the plaintiffs have failed to exhaust the remedies which they are required to pursue before being entitled to institute the present action.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

18. That the plaintiffs have failed to join all the parties who have an interest in this proceeding and whose presence is necessary in order that any judgment entered herein would dispose of all the issues and be binding and effective.

WHEREFORE, defendant, County of Madison, demands judgment dismissing the amended complaint of the plaintiffs, together with costs and disbursements of this action.

WILLIAM L. BURKE, ESQ.
Madison County Attorney
Attorney for Defendant,
County of Madison
Office and P.O. Address:
29 Lebanon Street
Hamilton, New York 13346
Tel: (315) 824-3550

TREATY OF CANANDAIGUA, NOVEMBER 11, 1794, 7 STAT. 44

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

Article I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

Article II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

• • •

Article IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor even disturb the people of the United States in the free use and enjoyment thereof.

• • •

Article VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations: and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers,

who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their India. friends aforesaid.

Article VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four. [There follows a series of signatures.]

TREATY OF SEPTEMBER 15, 1795

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread; Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto

the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at

the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Land between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North

one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. *Provided* always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said

State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained n the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith or part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

[There follows a series of signatures.]

TREATY OF JUNE 1, 1798

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York .....

The said Indians having in the month of March last Proposed to the Goveronor [sic] of the said State to cede the Lands herein after described, for the compensation herein after mentioned — and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation — And also the same Breadth for the distance of three miles

on the south side and of one mile on the north side of the said Road Eastward to commence at the Eastern Boundary of the said Lot No. 54, Provided and excepted nevertheless that the following Indian Families Viz: Sarah Docksteder, Jacob Docksteder, Cornelius Docksteder Lewis Denny John Denny, Jan Joost and Nicholas shall be suffered to possess of the Tract First above mentioned. The Grounds cultivated by them respectively and their improvements not exceeding Fifty Acres to each Family so long as they shall reside there — And in consideration of this Proviso and Exception the said Indians do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows— that is to say Beginning in the South east Corner of Lot No. 59, in the said last Purchase and running thence East one Mile, thence North two Miles thence West One Mile and thence South Two Miles shall be considered as set Apart by the said Nation or Tribe for the use of the said Families whenever they shall remove from where they now reside, The Said Agents do for the People of the said State pay to the said Indians in addition to the said sum of Three Hundred dollars already advanced to them as above mentioned the further sum of Two Hundred Dollars, And do grant to the said Indians that the People of the said State shall pay to the said Indians at their said Village on the First day of June next and on the first day of June Yearly thereafter the Annual Sum of Seven Hundred Dollars.

In Testimony whereof the said Commissioner, the said Agents and the said Indians have hereunto and to other Acts of the same Tenor and date the One to remain with the United States another to remain with the State of New York and another to remain with the said Indians set their hands and Seals at the Village Aforesaid the Day and Year first above written.

[There follows a series of signatures.]

TREATY OF JUNE 4, 1802

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York, on the fourth day of June in the year of our Lord One Thousand eight Hundred and Two

Present John Tayler Agent appointed under the authority of the United States to hold the Treaty, and Ezra L'Hommedieu and Simeon DeWitt Agents for the State of New York.

The said Indians having by their Sachems Chiefs and Warriors in the month of March last proposed to the Governor of the said State to cede the Lands hereinafter described for the compensation hereinafter mentioned And the said Governor together with the Surveyor General of the said State and Ezra L'Hommedieu Esquire an Agent appointed by the said Governor pursuant to concurrent resolutions of the Senate and Assembly of the State bearing date the 23d and 24 days of February last, having acceded to the proposal of the said Sachems Chiefs and Warriors, and on the fifth day of the said month of March executed a provisional agreement with them for the cession and purchase of the same, and advanced to them at their desire in part payment of the said Compensation three Hundred dollars, to answer the immediate Occasions of the said Indians — The said Cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty which hath on the request of the said Governor been appointed to be held for the purpose, as follows, that is to say, The said Indians do Cede release and quit claim to the people of the State of New York forever the several Tracts or parcels of Land hereinafter described, being parts of the lands heretofore reserved to the said Oneida Nation of Indians To wit, All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred

and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York then along the same westerly to a part of said last mentioned Land called the Two-mile strip, and then along the same northerly to the place of Beginning — Also, another Tract of Land bounded on the south by the Genesee Road, on the North by a Line drawn parallel to said Road — and at the Distance on an average of half a mile to the northward thereof, and extending from the West bounds of a tract of One hundred Acres now ceded and including Myndert Van Eps Wemples house westerly to the Lands heretofore ceded as aforesaid. Provided that the north bounds of the last described tract shall be run with such right Angular offsets as to leave the Indian Houses near the northwesterly corner of said Tract, Twenty chains distant from the same — Also, One Hundred Acres to be laid out in a square and to extend each way from the house of said Myndert Van Eps Wemple along the said Genesee Road fifteen chains and northerly from said Road fourteen chains and Southerly from said road twenty chains Also all that part of the land heretofore reserved by the said Oneida nation of Indians along the Fish Creek which lies to the northward of the Bridge over said Creek commonly called and known by the name of Bloomfields Bridge. The said Agents do for the people of the State of New York in conformity to the said provisional agreement pay to the said Indians in addition to the said sum of Three Hundred Dollars already advanced to them as above mentioned the further sum of Six Hundred Dollars, and do grant to the said Indians that the People of the said State shall annually forever hereafter on such day and place as are or shall be appointed for the Pay-

ment of other Annuities to the said Indians pay to the said Indians the sum of Three hundred Dollars. And the said Agents do further grant to the said Indians that the People of the State of New York, out of the lands above described and hereby ceded to them shall grant to Sarah Dockstader One Hundred Acres to be laid out in a square adjoining the Two-Mile Tract, on the Road commonly called Kiowia, Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life and thereafter to her heirs in fee. And ALSO to Michael Kern One Hundred and fifty Acres, so as to include the House in which he now resides with the other improvements made by him around the Same.

In Testimony whereof the said commissioner the said Agents and the said Indians have hereunto and to other Acts of the same tenor and date the one to remain with the United States another to remain with the State of New York and another to remain with the said Indians, set their hands and seals at the Village aforesaid the day and year first above written.

[There follows a series of signatures.]

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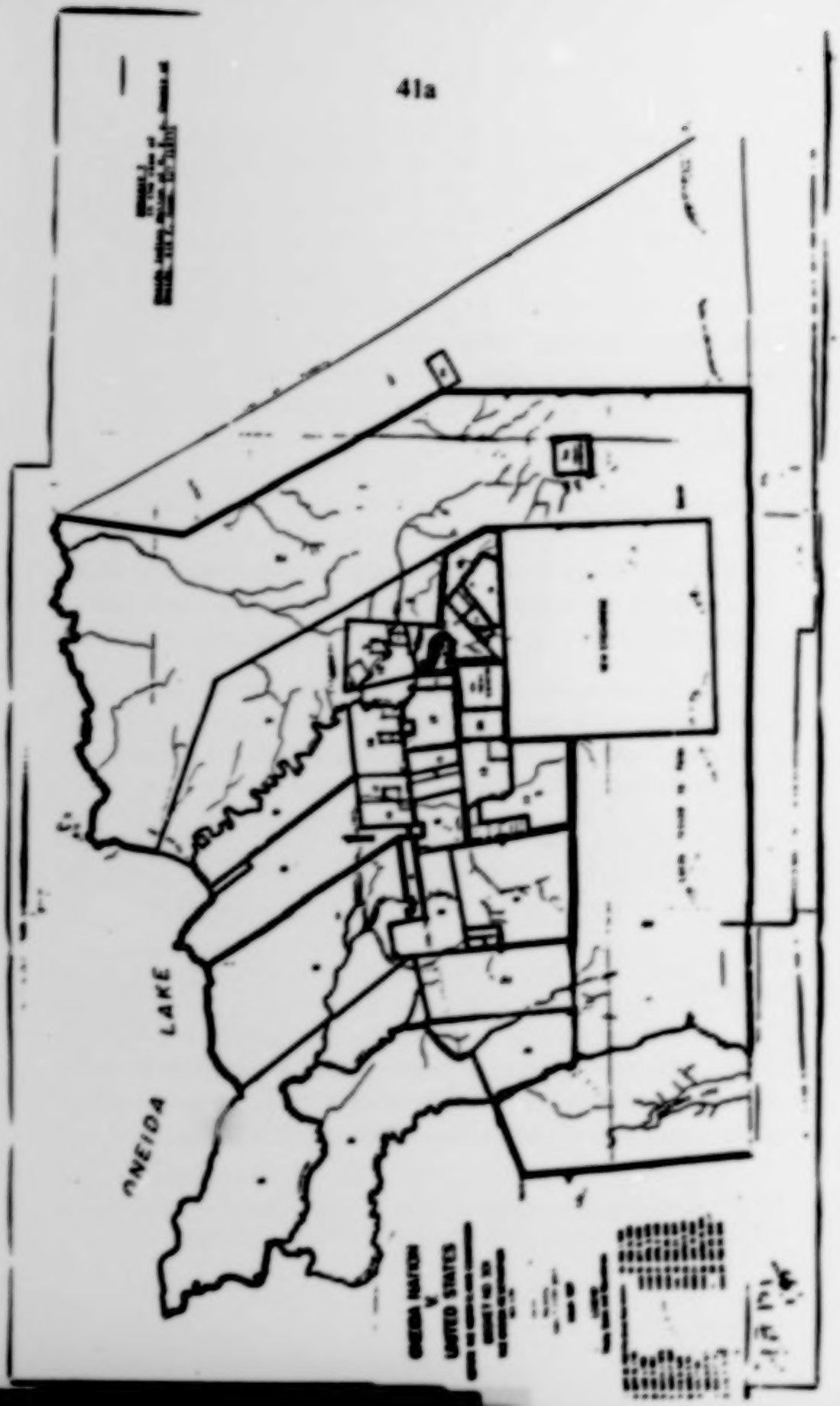

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

March 15, 1968

Mr. Jacob Thompson
President, Oneida Indian Nation of New York
RD 1, Route 11A
Nedrow, New York

Dear Mr. Thompson:

Consideration has been given to the petition submitted to the President of the United States by you on February 9th in behalf of the Oneida Nation of Indians of New York.

The petition requests the assistance of the United States in the prosecution of a claim against the State of New York for the allegedly wrongful taking of Oneida lands during the period from 1788 to 1842.

The petition is based on Articles II and VII of the Treaty of Canandaigua (7 Stat. 44), entered into by the United States and the Six Nations on November 11, 1894, which provides:

> The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, called their reservations, to be their property . . . said reservations shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase. (Article II)
>
> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side . . . complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose. (Article VII)

The Oneidas claim they have lost all but approximately 32 acres of their original 4,000,000—6,000,000 acre holdings in New York as the result of a series of sales to the State, all of which were for insufficient consideration or in violation of the Trade and Intercourse Act of July 22, 1790, 1 Stat. 44 (25 U.S.C. 177), or both.

The instant petition is actually the second request of its kind received by the United States from the Oneida Nation. The first was contained in a letter to the Interior Department dated June 5, 1967, a copy of which is attached, from Bond, Schoeneck & King, a Syracuse firm retained by the Oneidas to prepare and prosecute tribal claims against the State of New York under Special Contract 8 KC-1420-C-002, approved by the Assistant Secretary on March 28, 1967. Bond, Schoeneck & King also prepared the memorandum of law and fact which accompanies the present petition.

The Oneidas have a claim currently pending before the Indian Claims Commission for the very injuries presently complained of. A petition, designated Docket No. 301, was filed on August 10, 1951, by Aaron, Schinberg & Hess, who are retained as claims counsel for the Oneida Nation under Contract No. I-1-Ind-42421, approved by the Commissioner of Indian Affairs on

November 8, 1950, which asks judgment against the United States for the fair market value of Oneida lands sold to the State of New York between 1788 and 1946. Trial has been scheduled for February 4, 1970.

Since the United States has provided a forum for determining whether the Oneidas should be compensated for injuries sustained as a result of their eighteenth and nineteenth century dealings with the State of New York, no further government action on these claims seems necessary.

If you have any further questions, please feel free to write to us again.

It was a pleasure to see you last month when you were here to present the petition, and to talk with you over the telephone since then.

With all good wishes to you, I am,

Sincerely yours,

Robert L. Bennett
Commissioner of Indian Affairs

Enclosure

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs,	
v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants.	

MEMORANDUM-DECISION AND ORDER [AND JUDGMENT] [OF JULY 12, 1977]
[434 F.2d 527 (N.D. N.Y. 1977)]

PORT, Senior District Judge.

This case tests the consequences of the failure of the State of New York to comply with the provisions of the Indian Nonintercourse Act, enacted by the first Congres in 1790 and reenacted in substance by subsequent Congresses to the present

date. 25 U.S.C. § 177. Familiarity with the prior opinions in the case is assumed.[1]

In 1795, the State of New York acquired from the Oneida Indians, by an instrument variously denominated as a deed or treaty, 100,000 acres in Central New York. The counties of Oneida and Madison have acquired and now occupy undesignated but small portions of that acreage. The claim made in this case is limited to damages for the use and occupancy during the years 1968 and 1969 of those "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements."[2]

The issues can be summed up as follows: (1) Have the plaintiffs established that the transfer of land by the 1795 treaty to the State of New York was in violation of the Nonintercourse Act? (2) Have any of the defenses asserted by the defendants been established? (3) Are the defendants liable to the plaintiffs for damages resulting from defendants' use and occupancy of part of the subject land during 1968 and 1969? The answer to the first question is yes; to the second, no; and to the third, yes.

Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

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[1] *Oneida Indian Nation v. County of Oneida*, 70-CV-35 (N.D.N.Y. November 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972), *rev'd*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

[2] Plaintiffs' amended complaint ¶ 22.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 699 (9th Cir. 1976). Furthermore, it is incumbent upon "[g]reat nations, like great men, [to] keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S.Ct. 543, 567, 4 L.Ed.2d 584 (1960) (Black, J., dissenting).

The posture in which this case has been presented is reminiscent of *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), in which the Second Circuit said:

> Although there is directly before us only one lease, on which the annual rent is but $4, the question is of greater importance because the Nation, by resolution, has cancelled hundreds of similar leases.

Id. at 930. Likewise, the impact of the Oneidas' claim will reach far beyond the boundaries of the present suit. In my initial decision dismissing the claim for lack of jurisdiction, I pointed out that, "it obvious that there are, of necessity, numerous other parties occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom . . . claims could be made." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 9 n. 3 (N.D.N.Y., November 9, 1971).

Nor is the problem limited to this case,[3] this particular land transaction, the Oneida Indian Nation, or even this area.

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[3] "The Oneida Nations [sic] presently have two other actions pending in this district. *Oneida Indian Nation v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging some 25 treaties with New York State); *Oneida Indian Nation v. Williams*, 74-CV-187 (N.D.N.Y.) (action for ejectment against 23 landowners).

Other Indian tribes have similar claims[4] in several other states. Litigation brought by the tribes themselves,[5] or by the federal government in their behalf,[6] is already pending. Further suits brought by the United States are imminent. The Department of Justice has alerted the United States Marshal for this district that, unless Congress extends the statute of limitations for such suits beyond July 18, 1977,[7] an action on behalf of the Cayuga and St. Regis Mohawk tribes will be commenced immediately. The Marshal was given this advance notice because it is anticipated that the suit will involve some 10,000 defendants. The potential for disruption in the real estate market is obvious and is already being felt. News reports indicate that title companies have refused to insure titles in areas where Indian land claims exist, even if law suits have not yet been commenced.

The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles. This in no way is intended to be critical of the plaintiffs' conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means — but to no avail. The aid of the United States as guardian has been sought for the purpose of instituting claims against the State of New York, to challenge not only the 1795 sale but other treaties with the

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[4] These Indian claims have not all been pursued through the orderly mechanism of litigation. *See New York* v. *White*, 528 F.2d 336 (2d Cir. 1975). *White* arose out of the seizure of land in the Adirondacks by members of the Mohawk and other Indian tribes.

[5] *Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

[6] *See Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

[7] *See* 28 U.S.C. § 2415.

state.[8] The remedy afforded by Congress against the United States for alleged breach of trust has been and is presently being pursued before the Indian Claims Commission.[9] Finally, it is within the power of Congress to dispose of the matter under the constitutional delegation of power.[10]

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[8] *See* Tr. 198-99; Exhs. 46-48, 51. The parties have advised the court that the United States plans to institute a suit on behalf of the Oneidas to prosecute the tribe's land claims. *Compare*, *Passamaquoddy*, *supra* note 6.

[9] The progress of the Oneidas' action in the Indian Claims Commission can be ascertained by reference to the opinions of the Commission. *See* 26 Ind.Cl.Comm. 138 (Aug. 18, 1971); 37 Ind.Cl.Comm. 522 (Mar. 19, 1976), and the intervening opinion of the Court of Claims, *United States* v. *Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

In their answer, defendants raised as an affirmative defense the pendency of proceedings before the Indian Claims Commission. They allege that, "[t]his issue is presently before the . . . Commission." Defendants' answers ¶ 11. The simple rejoinder to this defense is that the same issue is not before this court and the Commission. The case at bar challenges the validity of the 1795 purchase of Oneida land; it seeks money damages from the defendants, present landowners who allegedly lack valid title to the land. The suit in the Indian Claims Commission charges the United States with breach of its fiduciary duty to protect the Oneidas in land dealings with the State of New York. *United States* v. *Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973). Although these are separate claims, recovery against the United States might well render any other suit academic.

A more important question, whether the Indian Claims Commission was created to provide an exclusive remedy for redress of wrongs to the Indian nations, was not raised by defendants but deserves comment. The Indian Claims Commission was created in 1946 "to right a continuing wrong to our Indian citizens," H.R.Rep.No. 1466, 79th Cong., 2d Sess. (1945), 1946 U.S.C.C.S. 1347, by creating a forum for Indian claims against the United States. The legislative history makes clear that the Commission was to consider only claims against the United States; no intent to supplant Indian claims against other parties, governmental or private, is evidenced. In discussing the nature of the claims to be considered by the Indian Claims Commission, the House Report mentions solely claims against the federal government. *See Id.* Section 1; 1946 U.S.C.C.S. 1350-51.

[10] *See* U.S.Const. art. I, § 8; *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960); *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260

The aptness of what was recently said by Chief Judge Kaufman is striking. "As in so many cases in which a political solution is preferable, the parties find themselves in a court of law." *British Airways Board* v. *Port Authority of New York and New Jersey*, 558 F.2d 75 at 78 (2d Cir. 1977).

I. NATURE OF THE PROCEEDING

The Oneida Indian Nations are suing for damages arising from the allegedly illegal use and occupancy of a part of their aboriginal land. In 1795, the State of New York purchased a large tract of the aboriginal land of the Oneida Nation. Plaintiffs claims that this purchase violated United States treaties and the Indian Nonintercourse Act, 25 U.S.C. § 177. Therefore, plaintiffs contend that the purchase was void and of no effect.

Part of the 1795 purchase is now occupied by the defendant counties. Plaintiffs measure their damages by the fair rental value of such land for the years 1968 and 1969, the period covered by the complaint.

II. BACKGROUND

The action was commenced in 1970. Following a motion for summary judgment by the defendants, this court dismissed the action for lack of federal jurisdiction. It was decided that diversity of citizenship was absent, 28 U.S.C. § 1332, and that federal question jurisdiction was lacking because the case did not "[arise] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a). This court held that the federal question failed to appear on the face of the complaint;

(1941); *cf. Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

it only appeared in anticipation of various defenses. The Court of Appeals affirmed, holding that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule." *Oneida Indian Nation* v. *County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972). However, the Supreme Court reversed, stating that plaintiffs'

> assertion of a federal controversy . . . rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974). Because the "Oneidas assert a present right to possession based in part on their aboriginal right of occupancy", *Id.*, the complaint on its face raises a federal question.

After remand, plaintiffs moved for summary judgment, but the motion was denied summarily. I held that summary judgment was inappropriate in such a complex and far-reaching case; a full exploration of all the facts was in order. However, trial of the issues was trifurcated. The parties agreed to try the issue of liability first, reserving the question of damages and that of liability of the State of New York to the defendant counties for later disposition.[11] Subsequently, the plaintiffs developed their proof, largely through documentary exhibits, in a three day trial. The defendants, relying only on the plaintiffs' proof and the law, submitted no evidence.

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[11] Transcript (Tr.) 8-9.

III. FACTS

The Parties

Originally, there were two plaintiffs, the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin. During the trial, plaintiffs moved to amend their complaint to join the Oneida of the Thames Band Council, a band of Oneidas from Ontario, Canada, as party plaintiffs. The motion was granted.

The three plaintiffs are the direct descendants of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War. According to expert testimony, this conclusion is supported by extensive research into the kinship and genealogies of the Oneida Nation. (Tr. 63-66, 163-65). Furthermore, the United States is presently paying annuities, which are owed to the Oneida Nation under the Treaty with the Six Nations, executed on November 11, 1794, to the Oneidas in New York and Wisconsin. The Wisconsin Oneidas receive their payments in cash, and the New York Oneidas in cloth. (Tr. 25-26). Also, the Bureau of Indian Affairs recognizes both the Wisconsin and New York Oneidas as the successors in interest to the Oneida Nation of 1794. (Tr. 26, Exh. 49).

This finding is not disturbed by defendants' allegations that the present leadership of the Oneida Nation of New York is in dispute. Regardless of which individuals hold office within the tribe, the tribe is recognized as the direct descendant of the Oneida Nation which inhabited New York 200 years ago. Nothing else is required.

The defendants are the Counties of Oneida and Madison. The parties agree that the defendants now occupy and claim to be the record owners of part of the aboriginal Oneida land, more specifically, part of that area of Oneida land purchased by New York State in 1795.

Historical Background

The Oneidas' aboriginal land ran from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. (Tr. 69). This region can be described as a band, about fifty miles wide, running north-south through eastern central New York. According to the records of the earliest white missionaries who came to upstate New York, the Oneidas were occupying this land during the early 17th Century. (Tr. 69, 137). They continued to occupy this land until shortly after the birth of the United States.

During the Revolutionary War, the Oneidas fought alongside the Colonists against the British. (Tr. 73). Aside from their service as scouts and their active participation in various battles in upstate New York, the Oneidas performed another valuable function for the Colonies — they prevented the Six Nations or Iroquois from taking a unified stand as allies of the British. (Tr. 73). The Iroquois were the most influential and powerful tribe in the Northeast and had traditionally been an ally of the British.[19] At the outset of the Revolutionary War, the Colonial government sought to secure the neutrality of the Iroquois. Although this result was not achieved, at least the Iroquois did not fight in unison against the Colonists. Because the Oneidas and Tuscaroras allied themselves with the Colonists, the Six Nations put out the council fires and permitted each nation to choose its ally independently.

After the War, the new nation sought to reward and protect its valuable ally, the Oneida Nation. The Treaty of Fort Stanwix, executed in 1784 to make peace with the Six Nations, expressly secured the Oneidas "in the possession of the lands on

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[19] *See F. Cohen, Handbook of Federal Indian Law* 417-418 (University of New Mexico Press reprint of 1942 Ed.) (hereinafter, *Federal Indian Law*).

which they are settled." (Exh. 1).[13] A few years later, in further thanks for their help, the federal government commissioned, post facto, several Oneidas as officers in the United States Army. (Tr. 88, Exh. 11). Twice again, in treaties between the Six Nations and the United States, the federal government secured the Oneidas in the possession of their land.[14]

However, in 1788, because of increasing pressures to open up the Oneidas' land to settlement, the State of New York purchased the great majority of the Oneidas' land from them. They were left with a reservation of about 300,000 acres in the area southwest of Oneida Lake. This reservation is outlined in Exh. 7 and the parties have stipulated that the land involved in this suit lies within the boundaries of this 1788 reservation.

In 1790, Congress passed the first Indian Nonintercourse Act (the Act). That statute prohibited any land transactions with Indian tribes that were not executed by public treaty under the authority of the United States. 1 Stat. 137-38 (Exh. 10). In 1793, the Act was amended into substantially its present form. The gist of the Act remains the same — unless by treaty with the United States or under the authority of the United States, no purchase or grant of land from an Indian tribe "shall be of any validity." 25 U.S.C. § 177.

The 1795 Purchase

By 1795 a conflict had developed between the United States and the State of New York over the State's power to negotiate purchases of land from the Oneidas. The federal policy toward the Oneidas remained the same — the government intended to reward them for past services and to protect them

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[13] Treaty of Fort Stanwix (October 22, 1784) 7 Stat. 15.

[14] Treaty at Fort Harmar (January 9, 1789) 7 Stat. 33 (Exh. 3); Treaty with the Six Nations (November 11, 1794) 7 Stat. 44 (Exh. 4).

from predation by the white settlers. (Exhs. 17, 19). New York, however, desired to purchase the Oneidas' land, along with the land of many other Indian nations within its borders. Secretary of War, Timothy Pickering, wrote to United States Attorney General William Bradford for an opinion on whether or not New York had the power to purchase Indian land without the intervention of the United States government. The Attorney General responded by stating the language of the Nonintercourse Act was "too express to admit of any doubt upon the question." (Exh. 22). The Act applied to New York. In his opinion Bradford did not question New York's right to land ceded to the State by treaty entered into prior to the adoption of the Constitution of the United States. However, as to the land reserved to the Oneidas under those treaties, he held that the Oneidas' rights could not be extinguished except "by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." (Id.)

Pickering had been informed that New York was attempting to purchase land from the Cayuga, Onondaga and Oneida Nations. In June of 1795, he wrote to Israel Chapin, Jr., Superintendent of the Affairs of the Six Nations, ordering him not to aid New York in these purchases. Chapin was further instructed to warn the Six Nations of the illegality of any such transactions with New York. Finally, noting that New York's Governor Clinton refused to request federal commissioners, Pickering hoped that the situation would improve when the new governor, John Jay, took office. (Exh. 24). The hope remained only a hope. In July, Jay wrote Pickering that "on *this* occasion I think I should forbear officially to consider and decide" whether the "Act of 1 March 1793" was constitutional or whether the conduct of New York violated either the United States Constitution or the 1793 Nonintercourse Act. He observed, however, that under the New York Constitution, transactions with Indian tribes must be pursuant to acts of

the Legislature; that the enabling legislation in this instance was silent "[a]s to any intervention or concurrence of the United States," nor did it "by implication direct or authorize the Governor to apply for such intervention." (Exh. 26). Jay noted that arrangements for the meeting with the Six Nations planned for later that summer were finished "before I came into office." (Id.)

Within a week, however, Jay wrote Pickering and requested the appointment of United States Commissioners to negotiate a treaty between New York and the St. Regis Indians. (Exh. 28). In a letter to President Washington, suggesting that a commissioner be appointed for the treaty with the St. Regis, Pickering pointed out New York's inconsistent policy for negotiating with Indians. The State was complying with statutory requirements for the St. Regis, but refused to do so when dealing with the Six Nations. (Exh. 29). The reasons for these differing approaches are nowhere made specific. However, Dr. Jack Campisi, a professor of anthropology and an expert on the Oneida Nations, suggested why New York acted as it had. He stated that New York perceived a difference in federal treatment of different Indian tribes. Since the Oneidas and the United States had been allies, the federal government felt bound to protect their interests. Tribes that had allied with the British received less federal protection. Consequently, New York complied with the Nonintercourse Act when negotiating with previously hostile Indians, but refused to do so when dealing with the friendly Oneidas. The State feared excessive federal protective intervention in the latter case.

In July, New York purchased the Cayuga and Oneida reservations for sums to be paid annually. The tribes were left with small parcels of land. (Exh. 31). When the New York Commissioners then moved on to the Village of Oneida, intending to purchase the Oneidas' land, Chapin travelled to Oneida hoping to dissuade the Indians from dealing with the State.

(*Id.*). At Oneida, he informed the tribe of the federal government's opinion of the illegality of such a transaction. (Exh. 32). He remained there for nine days and no deal was made. After leaving Oneida, Chapin was informed that the state commissioners left two days later, having been unable to reach any agreement with the tribe. (*Id.*). Late in August, Pickering wrote Chapin and informed him that he had acted properly in warning the Oneidas of the illegality of any purchase by New York. However, Pickering then told Chapin that "having done this much, the business might there be left." (Exh. 33). Chapin was instructed to leave matters as they stood.

Despite another letter from Pickering to Governor Jay, outlining the procedure to be followed under the Nonintercourse Act of 1793 (Exh. 34), the State continued to negotiate with the Oneidas. These negotiations culminated in a sale contrary to the provisions of the Act on September 15, 1795 by the Oneidas of approximately 100,000 acres of their reservation. (Exhs. 6, 35). The papers transferring the land were signed at Albany, which was not within the boundaries of the Oneidas' aboriginal land. (Exh. 35). Although the Six Nations had met with the British at Albany, the Oneida Nation had never before executed any treaty or land transaction there. (Tr. 111a-112a). Another irregularity in the transaction appears from the record. Ordinarily, treaties were entered into by tribal consensus (Tr. 188-89), by unanimous decision of the tribe. In this case, powers of attorney were executed enabling certain individuals, none of them chiefs, to negotiate the transaction at Albany. (Tr. 189). Also, although women were not allowed to speak at the tribal council (Tr. 190), half of those Oneidas signing the power of attorney were women. (Tr. 189). Finally, the names of the sachems and chiefs that appear on the September 15, 1795 document were not the signatures of Oneida chiefs. Rather, the signatories of the documents merely used the traditional Oneida names for their sachems and chiefs. (Tr. 192).

In the opinion of Dr. Campisi, no United States Commissioner was present in Albany when the State purchased this land from the Oneidas. (Tr. 126). Superintendent Chapin's expense account shows no expenses incurred in Albany in September of 1795. (Exh. 36). Defendants have presented no evidence demonstrating or even suggesting that a United States Commissioner was present. There is no record that Governor Jay ever requested a commissioner for this transaction. The only finding permitted by the record before me is that no United States Commissioner or other official of the federal government was present at the September 15, 1795 transaction.

Developments after 1795

After 1795, New York State continued to negotiate with the Oneidas for the purchase of their land. Between 1795 and 1846, 25 treaties were executed between the State and the Oneida Nation. Only two of these treaties were conducted under federal supervision as required by the Nonintercourse Act.[15] By 1846, the Oneidas' landholdings in New York had been diminished to a few hundred acres. (Tr. 267).

The social and economic pressures on the Oneidas naturally resulted in the alienation of their land. (Tr. 127-131). In addition, white settlers living in the areas continually encroached on the Oneidas' land. (Tr. 232-233). Land speculators were always urging the Oneidas to sell their reservations. At the same time, New York began agitating for the removal of the Oneidas and other Indians to western lands.[16] The policy of removal was not universally accepted among the Oneidas, and

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[15] *See United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

[16] *Federal Indian Law* 420.

the problem was exacerbated by the efforts of outsiders, clergy and advisors, to urge the Oneidas to move west. (Tr. 131). The Oneida Nation was split into several factions by these pressures. As a result, by the 1840's, three distinct bands of Oneidas existed. One band stayed on the remaining Oneida reservation land in New York; one group of almost 600 had settled on about 65,000 acres in Wisconsin; and another group of about 400 had moved to Ontario, Canada.

Unfortunately, the pressures on the Oneidas to part with their land did not cease once removal had been effected. The Oneidas' meager landholdings in New York were reduced further as a result of a New York statute which divided the tribal landholdings and gave the Oneidas an option to sell their land. (Tr. 227). This option to sell, coupled with the state of extreme poverty in which they lived, more or less forced the sale of much of the remaining Indian land. The loss of land in Wisconsin was much more drastic. In 1887, the Dawes Act, or General Allotment Act, was enacted by Congress. (24 Stat. 388, February 8, 1887). This Act broke up tribal landholdings, distributed individual parcels to individual Indian families, and removed restrictions on the transfer of title.[17] Again, because of the poverty of the Oneidas, they then lost their land through sales, tax sales, or mortgage foreclosures. By the time of the depression, the extent of the Wisconsin Oneidas' landholdings had decreased from 65,000 acres to approximately 600 (Tr. 132, 203, 280).

These forces which acted to deprive the Oneidas of their land had a similar adverse impact on the social conditions of the Oneida Nation. After the Revolutionary War, the Oneida Nation was extremely disorganized because of the displacements which had occurred during the many years of fighting, first against the French and later against the British. (Tr. 128). The

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[17] *Id.* at 208-17.

tribe was suffering from famine and widespread alcoholism. (Tr. 130). The poverty they then experienced became locked in a vicious circle with the loss of their land. These problems were complicated by the Oneidas' illiteracy. Prior to 1800, at the time the great mass of their land was lost, only a few Oneidas had even a minimal ability to understand English orally. (Tr. 129). None could read or write. This state continued through the early 1800's, during the time of removal. (Tr. 218). In fact, up through the 1950's, a translator was needed at meetings of the Oneida Nation of Wisconsin in order to explain actions of the federal government. (Tr. 225). The modest attempts to educate the Oneidas must be viewed in retrospect, as failures. There were schools established by missionaries on the New York reservation by 1796 and on the Wisconsin land by 1907. (Tr. 264). However, these schools had little or no impact on the Oneidas' illiteracy. It was not until 1928 that the first person graduated from the eighth grade from the mission school for the Oneidas in Wisconsin. (*Id.*).

Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. (Tr. 234). Usually, such petitioning was conducted through the Oneidas' Indian agent. On one occasion, in 1874, a group of Oneidas travelled from Wisconsin to Albany, New York and consulted with a private law firm. All of these efforts were to no avail. (Tr. 234-38). Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances. (*See* Exhibits 54, 55).

IV. PLAINTIFFS' CLAIM

The plaintiffs' claim is uncomplicated. The complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 1780's and 1790's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States[14] and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the Indians' right to possession under the federal treaties[15] and the applicable federal statutes. Also alleging that the 1795 cession was for an unconscionable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1968, through December 31, 1969. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 663-65, 94 S.Ct. 772, 775, 39 L.Ed.2d 73 (1974) (*footnote omitted*).

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[14] *See* notes 13 and 14 *supra*.

[15] Plaintiffs claim relief under both the Treaty and the Nonintercourse Act. Since relief is afforded under the statute, it is unnecessary to decide whether the plaintiffs are afforded a claim against these defendants for the alleged treaty violation.

V. NONINTERCOURSE ACT VIOLATION

Since its enactment in 1790 to the present time, the Nonintercourse Act has not materially changed. It is now codified at 25 U.S.C. § 177. It provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Mashpee Tribe v. *New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977) (*Mashpee*), is an action similar to this case. The plaintiff tribe seeks a declaratory judgment establishing its right to certain land in Massachusetts allegedly obtained from it in violation of the Nonintercourse Act. In addressing a motion to dismiss the complaint, the court stated that in order to establish a prima facie case,

> . . . plaintiff must show that:
> 1) it is or represents an Indian "tribe" within the meaning of the Act;
> 2) the parcels of land at issue herein are covered by the Act as tribal land;
> 3) the United States has never consented to the alienation of the tribal land;
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

Id. at 902.

In considering these four factors, attention will focus principally upon the facts relating to the Oneida Indian Nation of New York.[80]

The Oneida Indian Nation of New York has clearly established itself as a tribe within the meaning of the Nonintercourse Act. It is a tribe presently recognized by the Bureau of Indian Affairs.[81] The New York Oneidas still receive annuities under the 1794 Treaty with the Six Nations.[82] Furthermore, they, and the other plaintiffs as well, are the direct descendants of the Oneida Indian Nation which inhabited the area in question before and after the passage of the first Nonintercourse Act. The Act was intended to protect the Oneida Nation. *See Joint Tribunal [sic] Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

The land involved is covered by the Act. The land purchased in 1795 was part of an area reserved for the Oneidas in an earlier treaty with New York State and occupied by them at the time of the enactment of the first Nonintercourse Act. The tract was part of the Oneidas' aboriginal land. The Supreme Court has specified that Indian title in their aboriginal land is

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[80] Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.

[81] Tr. 26.

[82] Tr. 25-26.

entitled to federal protection. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666-69, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Furthermore, this land was secured to the Oneidas in three treaties with the United States, including the 1794 Treaty with the Six Nations.[11] The aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government, is certainly land covered by the Nonintercourse Act, 25 U.S.C. § 177. Therefore, a fiduciary relationship exists between the plaintiffs and the United States. *United States* v. *Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

The proof clearly establishes that the United States never consented to the 1795 purchase. No United States commissioner was present in Albany when New York consummated this cession.[12] In fact, the federal agent for the Six Nations, Israel Chapin, Jr., had earlier traveled to Oneida to dissuade the Indians from dealing with New York. No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The federal consent required by the Nonintercourse Act was not obtained before or after the fact.

Defendants argue that federal consent to this purchase was manifested by the subsequent conduct of the United States government. Defendants first raise the broad claim that the federal policy of removal of the Indians[13] validated the 1795 transfer. This broad argument misconceives the nature of Congressional approval required. Termination of Congressional responsibility under the Nonintercourse Act must be explicit. "[A]ny withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." *Passamaquoddy*, *supra*, 528 F.2d at 380 (footnote omit-

[11] *See* notes 13 and 14 *supra*.

[12] *See* text *supra* at 10-13.

[13] *See Federal Indian Law* 420.

ted). *See also United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 346, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Adoption of defendants' argument would emasculate the Nonintercourse Act. The policy of removal, in and of itself, did not effect ratification. Neither did the government's alleged awareness of subsequent transactions between the Oneidas and New York State, *see United States* v. *Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973), constitute a ratification of the 1795 purchase. Again, defendants can point to no "plain and unambiguous" expression of federal approval.

Defendants see in the 1838 Treaty of Buffalo Creek[14] and its treatment in *New York Indians* v. *United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898), "an explicit recognition and implicit ratification"[15] by Congress of the 1795 purchase, among others. They see a mirage rather than an oasis. The federal government's policy of removal began affecting the Oneidas shortly after 1810. Initially, some Oneidas moved to Wisconsin, where they received a large tract of land ceded by the Menominee and Winnebago tribes.[16] Other Oneidas moved to Canada.[17] The Wisconsin land with some exception was later "cede[d] and relinquish[ed] to the United States" in exchange for a large tract of land in Kansas. Treaty of Buffalo Creek, Article 1, 7 Stat. 551.

An examination of the Buffalo Creek Treaty and the *New York Indians* case fails to support the defendants' interpretation. On its face, the Treaty of Buffalo Creek ceded Indian rights in land in Wisconsin only; no mention was made of Oneida land in New York State. Neither is there any mention of the 1795 agreement with New York. This is a particularly

[14] Treaty of Buffalo Creek (January 15, 1838) 7 Stat. 550.

[15] Defendant County of Madison's Post-Trial Memorandum 32.

[16] *See Federal Indian Law* 420.

[17] Tr. 130-32, 163-68.

significant omission in view of the strenuous efforts made by the United States through President Washington and Secretary of War Pickering to enforce compliance with the Nonintercourse Act. (*See* Exhs. 17, 24). In light of the diametrically opposed views of the Governor of New York and the Central Government as to the applicability of the Nonintercourse Act to the 1795 transaction, (*compare* Exh. 22 *with* Exh. 20), it is hardly likely that the Treaty of Buffalo Creek would have ratified the agreement implicitly instead of expressly. Had there been a desire to legitimatize a transaction theretofore regarded as a contravention of the Nonintercourse Act, the opportunity was presented without question by the Treaty of Buffalo Creek. Article 13, headed "Special Provisions for the Oneidas Residing in the State of New York," 7 Stat. 554, not only presented a logical and convenient place for such a provision, but even suggested it if the parties, in fact, had it in mind. Furthermore, there was resistance among the Oneidas to the removal policy initially,[80] and to the arrangements specified in the Treaty of Buffalo Creek. This resistance to removal was a factor that brought about the dispute resulting in the *New York Indians* case.

> The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them [in Kansas].

New York Indians, *supra*, 170 U.S. at 28, 18 S.Ct. at 538.[81]

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[80] Tr. 130-31.

[81] [Defendants' assertion that the Court of Claims' opinion in *New York Indians v. United States*, 40 Ct.Cl. 448 (1905), established either federal ratification of the 1788 purchase or abandonment of the Oneidas' New York land is equally unsupportable. That opinion merely decided which Indians would participate in the award of damages for the disposition of their reservation in Kansas. The right to such damages had been established by the

Supreme Court in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898). The Court of Claims held that the Ontario Oneidas were entitled to share in the recovery. At no point did the court find that the New York Oneidas had abandoned their rights to their land in New York. In discussing the unsuccessful nature of the Treaty of Buffalo Creek, the Court noted that:

> None of the tribes moved or was removed to the country set apart, none of them made a demand or request for removal, some of them positively refused to remove when requested by agents and commissioners of the United States, others of them denied that they were parties to the treaty and asserted that it had been procured in their names by corruption and fraud.

New York Indians v. United States, 40 Ct.Cl. 448, 451 (1905).

In a similar context, the Supreme Court refused to infer that Congress extinguished the Walapais Indians' rights in their aboriginal land when it established a new reservation for the Walapais and other Indian tribes.

> We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, [32 S.Ct. 565, 569, 56 L.Ed. 941], the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353-54, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941) (footnote omitted).

The fourth element is proof that the trust relationship between the Oneidas and the United States was never terminated or abandoned.[28] The uncontradicted evidence establishes that this is so. The Oneidas are today a federally recognized Indian nation.[29] Furthermore, they continue to receive annuities under the 1794 Treaty with the Six Nations.[30] Defendants have introduced no evidence whatsoever of any plain and unambiguous withdrawal of Congress' trust obligations. See *Passamaquoddy*, *supra*, 528 F.2d at 280.

A prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established.

Two additional points urged by the defendants should be noted. In reliance on *United States v. Franklin County*, 50 F.Supp. 152 (N.D.N.Y. 1943), defendant County of Oneida construes the Nonintercourse Act as exempting from its coverage states "having a right of preemption", such as New York. In the light of later decisions, this holding of *Franklin County* cannot be considered authoritative. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent shall apply in all of the states including the original 13." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670, 94 S.Ct. 772, 778, 39 L.Ed.2d 73 (1974); *see also United States v. Oneida Nation of*

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[28] The essential elements of a prima facie case under the Nonintercourse Act trace their ancestry to *Passamaquoddy*, *supra*. *See Madigan*, *supra*, 427 F.Supp. at 902. Obviously, this fourth element was essential to plaintiffs' claim in *Passamaquoddy*, for the main issue there was whether a trust relationship existed between the United States and the Passamaquoddy tribe. Although I entertain doubts as to the need for proof of this element in an action brought by the tribe itself, the question is academic in this case since the trust relationship between the United States and the Oneidas has clearly never been terminated or abandoned.

[29] Tr. 20, Exh. 40.

[30] Treaty with the Six Nations (November 11, 1794) 7 Stat. 44. See Tr. 25-26.

New York, 477 F.2d 939, 943-44, 201 Ct.Cl. 346 (1973); *Seneca Indian Nation v. New York*, 397 F.Supp. 685 (W.D.N.Y. 1975).

Franklin County's description of the Act as "at most regulatory, designed to prevent fraud", *Franklin County*, *supra*, 50 F.Supp. at 156, and that conclusion that the Act, by its terms, does not require the presence of a United States Commissioner at a treaty as "a prerequisite to its validity", *Id.*, is also urged. The plaintiffs contend that a purchase of land in violation of the act is totally void, whether the Indian nation was defrauded or whether the consideration paid for the land was inadequate.[31] The language of the statute and cases which consider other transfers of restricted Indian land compel the conclusion that the statute renders the 1795 purchase void.

The Nonintercourse Act states that no purchase of Indian land, unless made by treaty or convention pursuant to the Constitution, "shall be of *any validity* in law or equity." 25 U.S.C. § 177 (emphasis added). Any person not employed or authorized by the United States Government who even attempts to negotiate such a purchase can be fined. *Id.* The language of Congress is plain. The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned.

When Indian land has been transferred contrary to the terms of Congressional enactment, the Supreme Court has not hesitated to void the transaction. In *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923), a Cherokee Indian

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[31] At a pre-trial conference, it was stipulated that inadequacy or lack of consideration is not relevant to either plaintiffs' claims or defendants' affirmative defenses, insofar as issues of liability are concerned. This stipulation does not extend to the damages phase of the trial. (Tr. 7).

leased his land in violation of Congressional restrictions. The Court held the lease void and further held that an Oklahoma statute creating a tenancy-at-will was invalid as applied to the land. In *Ewert* v. *Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922), a Quapaw Indian sold allotted land in accordance with a statute permitting alienation but prohibiting any person such as the purchaser, an Indian agent, from having "any interest or concern in trade with the Indians." Rev. Stat. § 2078. The Court held the purchase void and remanded for an accounting. 259 U.S. at 138, 42 S.Ct. 442. *See also Smith* v. *McCullough*, 270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926). A recent case in the Ninth Circuit concluded that the Nonintercourse Act prohibited the Walker River Paiute Tribe from granting an easement to a railroad. *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). In 1882, the railroad's predecessor negotiated with the Tribe and bought a right-of-way across its reservation without Congressional authorization. Ninety-four years later the agreement was held invalid.[36]

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

Id. at 699.

The result in the present case may seem equally harsh. Nevertheless, it is the result mandated by the Nonintercourse Act.

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[36] The Ninth Circuit also considered whether or not the railroad acquired a license for its right-of-way under various Congressional statutes granting rights-of-way to railroads. *See United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976).

VI. ABANDONMENT

Defendants argue that the plaintiffs abandoned the land involved in this suit, citing *Williams* v. *City of Chicago*, 242 U.S. 434, 37 S.Ct. 142, 61 L.Ed. 414 (1917). The facts of that case are instructive. In *Williams*, Pattawatomie Indians ceded their land around Lake Michigan to the *United States* and then moved west. Some fifty years later, they attempted to claim land which had originally been under Lake Michigan but had been reclaimed by the time of the suit. The Supreme Court held that the land under Lake Michigan, along with the rest of the aboriginal Pattawatomie land, had been abandoned. However, *Williams* is inapposite to the present case. The Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today.

VII. THE PASSAGE OF TIME HAS NOT BARRED THIS SUIT

The violation of the Nonintercourse Act which gave rise to this suit occurred in 1795. Plaintiffs did not commence this action until 1970, 175 years years later. Defendants argue that the passage of time has barred this suit; they raise the defenses of statute of limitations,[37] laches, adverse possesion and bona fide purchaser for value. Despite the extraordinary

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[37] Defendants contend that the action is barred by two of New York's statutes of limitations: the six year statute of limitations governing actions "for which no limitation is specifically prescribed by law", *N.Y.C.P.L.R.* § 213(1) (McKinney 1972); and the one year and ninety day statute of limitations governing actions against a county. *N.Y.Gen.Munic.Law* § 50-i (McKinney 1965).

period of time which has passed, the action is not barred. The suit was commenced within the time permitted by 28 U.S.C. § 2415 which governs actions brought by the United States for or on behalf of Indian tribes. This period of limitations applies also to a case such as this one, brought by Indian tribes in their own behalf. Even assuming the necessity of fashioning a federal statute of limitations, Congress has supplied the model to be followed by Section 2415.

It is quite clear that state statutes of limitations and state laws of adverse possession and laches would not bar a suit brought by the United States on behalf of an Indian nation. Where the United States holds title to land in trust for Indians, adverse possession cannot run against the land. *United States* v. *7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). Restrictions on the alienation of Indian land, which have their origin either in treaties or in land patents, are not weakened by the passage of time. Adverse possession and laches are no defense to a suit by the government to protect restricted land. "It has long been held that adverse possession under a state statute of limitations cannot run against Indians if the land is not alienable by them, so long as such restrictions exist." *United States* v. *Schwarz*, 460 F.2d 1365, 1371 (7th Cir. 1972); *see United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). In *Ahtanum*, the Ninth Circuit pointed out the impact of the Nonintercourse Act on these defenses.

> And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in *United States* v. *7,405.3 Acres of Land*, 4 Cir. 97 F.2d 417, 422, arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

United States v. *Ahtanum Irrigation District*, *supra*, 236 F.2d at 334 (footnote omitted).

Similarly, where individual Indians sue to rescind transfers of restricted Indian land, state defenses cannot render the transfers effective. In a suit to declare invalid a transfer of a restricted land patent, the Supreme Court held that laches was inapplicable. *Ewert* v. *Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922). Also, in an action for wrongful use and occupancy, a state statute which created a tenancy-at-will was held ineffective where Indian land had been leased in violation of Congressional restrictions. *Bunch* v. *Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923). If a transfer of Indian land is void under federal law, *see, e.g.*, 25 U.S.C. § 177, it cannot later be made valid by operation of state law.

In the instant case, aboriginal Oneida land was transferred in violation of the Nonintercourse Act, 25 U.S.C. § 177. That statute declares, without any qualification, that no purchase made in violation of the Act "shall be of any validity in law or equity." The language of Congress could not have been plainer. Although this purchase occurred in 1795, it had no validity then nor does it today. New York's statute of limitations and the doctrines of laches, adverse possession, and bona fide purchaser cannot validate this transaction.

This same conclusion has been reached by two other district courts in suits brought to regain Indian land alienated in violation of the Nonintercourse Act. *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976). These cases emphasize the supremacy of federal law, which forbade the transfers, over state statutes which would validate them after the fact. The court in *Narragansett* went further. It noted that the United States, as sovereign, was not subject to these defenses. *See Narragansett*, *supra*, 418 F.Supp. at 805 and

cases cited therein. It reasoned that the Congressional interests in protecting Indian land are the same, whether the United States or the Indians are plaintiffs. Thus, the Indians were permitted to assert the sovereign's interests and the defenses based on the passage of time were held inapplicable. It would be anomalous to permit the government, as trustee for the Indians, to achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf. *See Schaghticoke, supra*, 423 F.Supp. at 785.

This conclusion does not necessarily eliminate the application of any statute of limitations. 28 U.S.C. § 2415** provides

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** The relevant portions of 28 U.S.C. § 2415 provide:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of such such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.
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> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is

a federal statute of limitations for cases brought by the United States for or on behalf of a recognized tribe of American Indians. Actions relating to restricted Indian lands are barred unless brought within 11 years of the date the claim accrued. Any claims which accrued prior to July 18, 1966, the date of the statute's enactment, are deemed to have accrued on the date of enactment. Although Section 2415 does not expressly include suits brought by Indian tribes *in haec verba*, it has been so construed. *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 405 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975). Actually, whether the limitations of Section 2415 apply to suits brought by Indian tribes as well as the United States is irrelevant in this case. The plaintiffs' complaint was filed in 1970,

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> founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States, an action to recover damages resulting from fire to such lands, an action to recover for diversion of money paid under a grant program, and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.
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> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.
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> . . . . . .
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> (g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

well within the bar provided by the statute. *See Id.* at 472 (Miller, J., concurring).

VIII. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY

Defendants argue that the case must be dismissed for failure to join the United States as an indispensable party. They contend that the fiduciary relationship between the United States and the Indian nation, along with the general federal interest in Indian lands, require that the United States be made a party to the action or that the action be dismissed. Neither Rule 19 of the Federal Rules of Civil Procedure, nor the adjudicated cases require such a result.[*] The Court of Appeals for the Tenth Circuit, faced with an almost identical situation, refused to dismiss the action. There, plaintiff Indian nations had sued to recover possession of land that was part of the tribes' communal allotment.

> If we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago. On the other hand, if they are permitted to prosecute the suit, in the absence of the United States, a judgment in favor of the defendants will not bind the United States. Defendants assert that that will result in a continuing cloud upon their titles. But, that is their present situation. So long as the United States fails to commence and prosecute to

[*] For an analysis of the factors to be considered in connection with Fed.R.Civ.P. 19, *see Prescription Plan Service Corp. v. Franco*, 552 F.2d 493 (2d Cir. 1977).

final judgment, an action to establish the title of the Nations to such lands and to recover possession thereof for the Nations, the title of the defendants will continue to be clouded by the possibility of the United States thereafter bringing such an action. So it comes down to this: If we hold that the United States is an indispensable party, the Nations will be unable to assert their longstanding claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.

We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations.

We conclude that final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience.

Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952).

Two recent decisions in cases almost identical to this one, have held that the United States is not an indispensable party. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976). These decisions were based on a long line of cases which have consistently held that, whenever Indian tribes or individual Indians sued to recover either tribal land

or individual allotments, the United States is not an indispensable party. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1236 (1968); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Jackson v. Sims*, 201 F.2d 250 (10th Cir. 1953); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952). *See generally* 3A *J. Moore, Federal Practice* ¶ 19.09[8] at 2325 (2d Ed. 1974).[*]

Defendants cite cases that have reached the opposite conclusion for the general proposition that, whenever title to Indian land is involved, the United States is an indispensable party. *See Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975); *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). However, these cases all involve attempts to burden land adversely to the interests of the Indians or the United States. These cases have found the United States to be an indispensable party because the United States owns the ultimate fee title to such land, and because a judgment adverse to the Indians could impair the rights of the United States in that fee. These cases differ from the instant suit by Indian tribes to recover aboriginal land, and this important distinction has been noted by the Tenth Circuit.

> In *Choctaw and Chickasaw Nations v. Seitz*, [citation omitted] we recognized the distinction between the indispensability of the Secretary of Interior in a suit, the effect of which would alienate Indian land, and the dispensability of the Secretary in a suit, the effect of which would protect Indian land against alienation, particularly where the Secretary refused, refrained or neglected to protect the Indian's interest.

Jackson v. Sims, 201 F.2d 250, 252 (10th Cir. 1953).

Finally, defendants contend that *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975), compels a dismissal here. Defendants assert that *Passamaquoddy* requires a "judicially-initiated effort asking that the United States act on the plaintiffs' behalf" as "a prerequisite to any suit alleging noncompliance with the *Nonintercourse Act*." Defendant County of Madison's Post-Trial Memorandum 9. This suggested reading of *Passamaquoddy* lacks support in the facts. It appears to be a case of the wish being father to the thought.

> Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address.

Passamaquoddy, *supra*, 528 F.2d at 375. Nor was the right of the tribe to litigate without the intervention of the United States at issue because of the apparent immunity of Maine to suit. *Passamaquoddy* definitely did not require a suit against the United States as a prerequisite to a tribe's suit under the Nonintercourse Act.

Two actions similar to the instant one, both brought in the First Circuit, have found that *Passamaquoddy* did not hold the United States to be an indispensable party. *Mashpee Tribe*

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[*] Now must the United States be joined in an action against third persons by certain Indian nations to establish title to and to recover possession of land constituting part of the unallotted common domain of the nations, or in an action by an Indian tribe to quiet title to lands claimed under a treaty with the United States. 3A *J. Moore, Federal Practice*, ¶ 19.09[8] at 2325 (2d Ed. 1974) (footnotes omitted).

v. New Seabury Corp., 427 F.Supp. 899 (D.Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

IX. THE STATE OF NEW YORK IS NOT AN INDISPENSABLE PARTY

Defendants contend that the action must be dismissed for failure to join the State of New York as an indispensable party. Defendants argue that, as counties, they hold land only as agents of the State. They further argue that an action against the counties will be binding on the State under the law of agent and principal — thus making the State an indispensable party and requiring the dismissal of the suit. The first premise of this argument, however, is faulty and with that faulty foundation removed, the argument collapses.

New York County Law empowers a county's Board of Supervisors to "acquire by purchase or condemnation and accept by gift real . . . property for lawful county purposes." *N. Y. County Law* § 215(2). The county is permitted to lease such property (*Id.*), build upon it (*Id.*), and "sell and convey all the right, title and interest of the county therein." *Id.* § 215(5). Nothing in the statutes limits the extent of the county's title nor specifies that the county holds property as an agent for the State. Neither do any of the cases cited by defendants state that counties in New York hold title to land as agents of the State. *Village of Kenmore v. Erie County*, 252 N.Y. 427, 169 N.E. 627 (1930) (statute requiring counties to collect taxes for villages struck down as violative of state constitutional provision forbidding counties from incurring debts); *Village of Croton-on-Hudson v. County of Westchester*, 38 A.D.2d 979, 331 N.Y.S.2d 883 (2d Dep't.), *aff'd*, 30 N.Y.2d 950, 335 N.Y.S.2d 825, 287 N.E.2d 617 (1972) (county enjoined from diverting parkland to use as a dump without legislative authorization). One case cited by defendants stated, by way of dicta, that a "county is a mere agent of the State." *County of Cayuga v. McHugh*, 4 N.Y.2d 609, 614, 176 N.Y.S.2d 643, 647, 152 N.E.2d 73, 76 (1958). However, the New York Court of Appeals added that counties, as political subdivisions, have "no power save that deputed to them by [the State Legislature]." *Id.* The language of § 215 of the County Law is clear enough — the State has authorized counties to acquire lands, to hold title to these lands, and to use or dispose of them, within certain limits. *N. Y. County Law* § 215. *See also Cooke v. Mulligan*, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup.Ct. 1975).[a]

Ward v. Louisiana Wild Life and Fisheries Commission, 224 F.Supp. 252 (E.D.La. 1963), *aff'd*, 347 F.2d 224 (5th Cir. 1965), cited by defendants, is inapposite. There, the state was the record owner of the land in question. That land had originally been deeded to the Louisiana Board of Commissioners for the Protection of Birds, Game and Fish. A subsequent statute transferred the land to the State of Louisiana.

Since the defendants are the record owners of the land involved in this suit, and since they hold this land in their own right and not as agents for the State, the State need not be joined. Fed.R.Civ.P. 19(a). Complete relief can be accorded

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[a] All of the properties involved here had already been acquired by Albany County as the result of previously held tax sales — most, if not all, of which were conducted long before the plaintiff was elected to office. As such they must be considered county properties and the County owns them proprietorially and can continue to hold them, sell them or lease them pursuant to the provisions of County Law § 215, or otherwise dispose of them at such times and upon such terms as shall be determined by the County Legislature, with or without advertising for bids, subject only to ultimate approval by a majority vote of that body.

Cooke v. Mulligan, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup. Ct. 1975).

among the present parties, the State cannot be prejudiced in any way by its absence, nor does the State's absence subject any of the parties to possible multiple liabilities. Dismissal under Fed.R.Civ.P. 19(b) is not required. *Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977).

Defendants concede that the Eleventh Amendment does not insulate them from suit. They argue that the suit must be dismissed against them, however, because the State cannot be made a party defendant by reason of the Eleventh Amendment. Having already determined that it is not necessary to make the State a party defendant, it is equally unnecessary to consider any argument based on the Eleventh Amendment.[42]

X. FORM OF THE ACTION

Casting about among the old common law forms of action for a label with which to tag the claim in this action, the defendants state, "It is difficult to characterize the nature of the plaintiffs' action." Defendant County of Madison's Post-Trial Memorandum 26. They find the most appropriate to be either the old common law "action for use and occupancy" or "an action for wrongful dominion" or one "of trespass for mesne profits." The defendants then argue with some force that the complaint does not allege all of the essential elements required for any of these actions. *See Crawford* v. *Town of Hamburg*, 19 A.D.2d 100, 101, 241 N.Y.S.2d 357, 359 (4th Dep't. 1963); *Kolman* v. *Wilen*, 283 App.Div. 1113, 131 N.Y.S.2d 679, 680 (2d Dep't. 1954); *see generally* 28 C.J.S. *Ejectment* § 132 (1941); 91 C.J.S. *Use and Occupation* § 3 (1955). There is no need to consider the pleading question posed by this argument.

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[42] In any event, equity and good conscience, as in the case of the United States, would militate against dismissal. Fed.R.Civ.P. 19(b). The State is no more an indispensable party than any other person in the chain of title.

As I said in the initial decision considering the jurisdictional question, "[n]o purpose would be served trying to tack a name on the cause of action asserted." *Oneida Indian Nation* v. *County of Oneida*, 70-CV-35, slip op. at 3 (N.D. N.Y., November 9, 1971).

To start with, the precise form of this action, which would have been so important at common law, is no longer determinative of the action's outcome. Under the Federal Rules of Civil Procedure, the question is not how plaintiffs have characterized the action, but whether plaintiffs are entitled to relief. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Fed.R.Civ.P. 54(c). *See generally 6 J. Moore, Federal Practice* ¶ 54.62 (2d Ed. 1976); *10 C. Wright and A. Miller, Federal Practice and Procedure* § 2664 (1973).

> [It] is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, trover, money had and received, or trespass. The real question is whether, under the facts disclosed in the complaint, the plaintiff is entitled to relief. If he is, the court can apply the proper remedy, [under] Rule 54(c) . . ..

Commonwealth Trust Co. of Pittsburgh v. *Reconstruction Finance Corp.*, 28 F.Supp. 586, 588 (W.D.Pa. 1939). *See also Herzog & Straus* v. *GRT Corp.*, 553 F.2d 789, 791 n.2 (2d Cir. 1977).

Neither can the defendants derive comfort from their contention that the plaintiffs' complaint and proof failed to meet the requirement of state law. "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law . . .." *Oneida Indian Nation*, *supra*, 414 U.S. at

674, 94 S.Ct. at 781. Referring to the Indian tribes' right of occupancy, the Supreme Court pointed out that such right "sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. . . . [T]hese tribal rights to Indian lands became the exclusive province of the federal law." *Id.* at 667, 94 S.Ct. at 777. Thus, it is of little import that the plaintiffs failed to establish the elements of a state-based cause of action. *United States* v. *Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942) (Seneca Indian Nation suit not barred by failure to comply with state law).[43]

The plaintiffs have established a claim for violation of the Nonintercourse Act. Unless the act is to be rendered nugatory, it must be concluded that the plaintiffs' right of occupancy and possession to the land in question[44] was not alienated. By the deed of 1795, the State acquired no rights against the plaintiffs; consequently, its successors, the defendant counties, are in no better position.

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[43] In *United States* v. *Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), the Seneca Indian Nation sued to cancel a 99 year lease of a portion of its land. Defendant lessees first argued that the suit should be dismissed since they had tendered the rent as New York law requires. The Second Circuit refused to apply New York Law. *Id.* at 932. Defendants also argued that according to the common law, the remedy of cancellation was unavailable because plaintiffs had not made a demand for the rent. The court rejected this argument and declined to be bound by "ancient doctrine." *Id.* at 937.

> It follows that we are here at liberty to apply legal rules as to landlord and tenant which comport with the Congressional intent concerning the Senecas.

Id. at 938. The Court of Appeals ultimately remanded the case to the district court for entry of judgment in favor of plaintiffs, on the condition that plaintiffs' offer for a new lease at a more reasonable rent be kept open. *Id.* at 943.

[44] The parties have stipulated that defendants are record owners of part of the land transferred in 1795. (Tr. 6).

In this phase of the trial, the only question to be determined is that of liability.[45] The extent of the liability and the manner in which the relief is to be fashioned remain for another day. *Cf. Illinois* v. *City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

This Memorandum-Decision and Order shall constitute the court's findings of fact and conclusions of law. Fed.R.Civ.P. 52(a).

The court having jurisdiction of the subject matter and the parties hereto, for the reasons herein, it is

ORDERED, that the issue of liability be and it hereby is decided in favor of the plaintiffs and against the defendants; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be and they hereby are held liable to the plaintiffs by reason of said defendants' occupancy of the land in question during the years 1968 and 1969, all other issues to be determined in a subsequent trial.

The parties have indicated a need for, and the circumstances would seem to compel an appeal from this Order. However, the determination herein does not constitute a final judgment or a judgment which could appropriately be certified for entry as a final judgment pursuant to Rule 54(b), Fed.R.Civ.P. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 681 n.5 (9th Cir. 1976). Therefore, pursuant to 28 U.S.C. § 1292(b), I hereby certify that in my opinion the within Order involves a controlling question of law, *i.e.* whether a violation of the Nonintercourse Act in 1795 gives rise to a claim against the present record owners of a portion of the involved land. I further certify

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[45] *See* note 11 and accompanying text *supra*.

that an immediate appeal from the Order may materially advance the termination of this and other litigation held in abeyance pending the determination of the issue herein. *See* Rule 5, Fed.R.App.P.

July 12, 1977.

[There follows that portion of the pre-trial memorandum of the counties which relates to the issue of remedies, was treated, alternatively, as a motion to dismiss and is the subject of the order of the court dated March 2, 1981]

Pre-Trial Memorandum of the County of Oneida, New York and the County of Madison, New York on the Issue of Remedies.

I. Introduction.

On July 12, 1977, this Court found that the plaintiff Oneida Indian Nation of New York ("Oneidas") had established that the transfer of land (the "subject land") by the Oneidas to the State of New York pursuant to a 1795 treaty was in violation of the Trade and Intercourse Act. *Oneida Indian Nation of N.Y. v. County of Oneida*, 434 F. Supp. 527, 530 (N.D.N.Y., 1977).[1] The Court further determined that the defendants, the counties of Oneida and Madison, New York ("counties") were liable for damages resulting from their use and occupancy of a portion of the subject land from January 1, 1968 through December 31, 1969. *Id.*[2]

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[1] According to the Court, "[b]y the deed of 1795, the State acquired no rights against the plaintiffs; consequently, its successors, the defendant counties, are in no better position." 434 F. Supp. at 548.

[2] Paragraph 22 of the Oneidas' Amended Complaint states that:

> "Subsequent to the 'Treaty' of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000, exclusive of costs and interest."

The matters determined at the 1977 trial concerned only the issue of liability as between the Oneidas and the counties. According to the Court, "[t]he extent of the liability and the manner in which the relief is to be fashioned remain for another day." 434 F. Supp. at 548. That day has now come and, therefore, this memorandum addresses the legal standards which the Court must apply in devising a remedy, if one exists at all, and if it does, in establishing the measure of damages which accompany a violation of the Trade and Intercourse Act.

II. Nature of the Proceedings.

The Supreme Court has characterized this lawsuit as "essentially a possessory action. . . ." *Oneida Indian Nation of New York State* v. *County of Oneida*, 414 U.S. 661, 666 (1974). Despite this Court's earlier observation that "[n]o purpose would be served trying to tack a name on the cause of action asserted", 434 F. Supp. at 547, quoting *Oneida Indian Nation* v. *County of Oneida*, 70-CV-35, slip op. at 3 (N.D.N.Y., November 9, 1971), Justice Rehnquist noted in his concurring opinion, 414 U.S. at 683, that:

> ". . . the complaint in this action is basically one in ejectment. Plaintiffs are out of possession, the defendants are in possession allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession."

The measure of damages appropriate in a typical ejectment action has been the frequent subject of court opinion and is well known. However, the instant action, in Justice Rehnquist's words, is not a "garden-variety" ejectment claim. 414 U.S. at 684. Rather, this Court is required to determine "what the consequences would be if it [the 1795 deed] did not" comply with the 1793 version of the Trade and Intercourse Act. *Oneida Indian Nation of N.Y.* v. *County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972). This Court has already concluded that the "statute renders the 1795 purchase void." 434 F. Supp. at 541. At issue now is, having come to this conclusion, whether this Court is empowered to award the Oneidas the additional relief sought — monetary damages for the fair rental value of the subject land.

III. The Only Remedy Provided for by the Trade and Intercourse Act is a One Thousand Dollar Criminal Fine.

A. *General Principles for Implying a Private Cause of Action.*

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1928).

The Trade and Intercourse Act of 1793, like its modern-day successor section 177 of 25 U.S.C., was not silent on the question of the appropriate remedy to be imposed in the event the section is violated. Rather, the law both then and now explicitly states that "*if any person . . . shall . . . directly or indirectly . . . treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars. . . .*" (emphasis supplied). The Trade and Intercourse Act therefore provides no express cause of action for the remedy the Oneidas seek, i.e., civil damages for wrongful possession of the subject land.

The question whether courts may create or imply a remedy not explicitly set forth in a statute has received considerable atten-

tion as of late from the Supreme Court. Even a casual reading of recent Supreme Court pronouncements in this area suggests that courts should be extremely wary about devising remedies not provided for by the particular statute in question. *See Transamerica Mortgage Investors, Inc.* v. *Lewis*, ____ U.S. ____, 62 L.Ed.2d 146 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223 (1980). Thus, regardless of whether a court might find it desirable to imply a private right of action to effectuate the perceived purposes of a statute, "what must ultimately be determined is whether Congress intended to create the private remedy asserted. . . ." *Transamerica*, *supra* at 152.

In the instant action, the United States on behalf of the Oneidas is not seeking the statutorily established $1,000 penalty. Rather, the Oneidas themselves ask for the fair rental value of the subject land for the years 1968 and 1969. Monetary damages of this sort are simply not recoverable under the terms of the Trade and Intercourse Acts.

The issue of whether one may imply a private right of action for damages under the Trade and Intercourse Acts has never been squarely addressed by any court. Although this is, therefore, a matter of first impression, statutes remarkably similar in both language and intent have been so scrutinized. In *Transamerica*, *supra*, the Supreme Court had to determine whether a private right of action for damages could be implied under section 215 of the Investment Advisers Act (15 U.S.C. § 80b-15) on behalf of the intended beneficiaries of that statute. The Court of Appeals had accepted the proposition that although the Act nowhere expressly provided for a private cause of action, one could be properly implied as necessary to achieve the goals of Congress in enacting the legislation. *Transamerica*, *supra* at 151. The relevant language of the statute in question reads as follows:

> "(b) *Every contract made in violation of any provision of this subchapter* and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation or order thereunder, *shall be void* . . . ." (emphasis supplied).

The Court found that this section, the language of which is, as noted, remarkably similar to 25 U.S.C. § 177, was enacted to benefit the clients of investment advisers and parties to advisory contracts. Indeed, the Investment Advisers Act established "federal fiduciary standards" to govern the conduct of investment advisers. Despite the congressional wish to establish enforceable fiduciary obligations, the Court noted that ". . . whether Congress intended additionally that these provisions would be enforced through private litigation is a different question." *Transamerica*, *supra* at 153; *see also National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974).

The issue of "whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Transamerica*, *supra* at 151-152. An analysis of the Investment Advisers Act revealed that it did not explicitly provide for a private right of action. Similarly, the legislative history was silent on this issue. Intent to create such a cause of action may, however, be ascertained from the language or structure of the statute or the circumstances surrounding its enactment. *Id.* at 154. After conducting such an analysis, the Court stated that:

> "If monetary liability to a private plaintiff is to be found, it must be read into the Act. *Yet it is an elemental canon of*

statutory construction that where a statute provides a particular remedy or remedies, a court must be chary of reading others into it." Id. at 154-155. (emphasis supplied).

The Court then rejected the *Transamerica* plaintiffs' claims for damages. *Id.* at 157.

In *Leist* v. *Simplot*, Slip Op. 2d Cir., July 8, 1980, Judge Mansfield, in a dissenting opinion, remarked that "if the statute does contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied." The Investment Advisers Act provided for several remedies. A judicial and administrative enforcement mechanism was established. Suits for injunctive relief were authorized and violators were subject to criminal penalties:

> "In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absent-mindedly forgot to mention an intended private action.'"
> "Obviously, then, *when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.*"
> *Transamerica, supra* at 155.

The parallels between the *Transamerica* decision and the issue now before this Court with respect to the Trade and Intercourse Acts are striking. Indeed, *Transamerica* appears to be precisely on point and, therefore, dispositive of the issue. The statutory language in each case is practically identical: contracts or conveyances made in violation of the respective statutes are declared void. *Cf.* 15 U.S.C. § 80b-15 with 25 U.S.C. § 177. Administrative enforcement mechanisms and criminal penalties for violations of both laws are explicitly established. *Cf.* 15 U.S.C.

§§ 209, 217 with 25 U.S.C. §§ 177, 180. Neither statute expressly provides for a private right of action for damages, nor does either "create or alter any civil liabilities" in favor of private plaintiffs. *Transamerica, supra* at 154; see also *Kissinger, supra* at 4226. The legislative history of both acts is silent on the issue and, "[i]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross, supra* at 571.

> "[W]here, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatever in the legislative history that [the statute] may give rise to suits for damages reinforces [the] decision not to find such a right of action implicit within the section." *Id.*

Although both laws were enacted to fulfill federal fiduciary obligations to certain parties,

> ". . . the mere fact that the statute was designed to protect advisers' clients [Indians] does not require the implication of a private cause of action for damages on their behalf [citations omitted]. The dispositive question remains whether Congress intended to create any such remedy."
> *Transamerica, supra* at 157.

The Supreme Court concluded in *Transamerica* that Congress did *not* intend to create a private cause of action for damages. This Court should follow the Supreme Court's reasoning and reach a similar conclusion here. Indeed, the case for such a conclusion is even stronger here than it was in *Transamerica*, for there is relevant legislative history concerning the Trade and

Intercourse Act, and it demonstrates conclusively that Congress intended no private cause of action for damages."

Despite the clear message enunciated by the Court in *Transamerica*, the Second Circuit has held that under certain circumstances a court may still imply a private cause of action for damages. *See Leist* v. *Simplot*, *supra*. In *Leist* the Second Circuit ruled that the Commodity Exchange Act implied a private right of action on behalf of injured investors. In reaching this decision, the Second Circuit relied on strong indications in the legislative history that Congress intended to preserve private rights of action and a background of judicial interpretation of the statute recognizing such rights. The decision in *Transamerica* was distinguishable because:

> "Unlike the congressional action in 1974 involved in this case, or that in Cannon in 1972, *the congressional actions in 1934 and 1940 under review in Redington and Transamerica were not taken against a background of widespread judicial recognition of implied private causes of action for damages* either as a general matter or with respect to the specific subject matter of these statutes." (emphasis supplied)

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[9] It should be noted that, in the absence of such relevant legislative history, the Supreme Court held that section 215 of the Investment Advisers Act implicitly created a cause of action for rescission and restitution. This is not the relief the Oneidas are seeking here, however. Furthermore, the Supreme Court stated that restitution under section 215 would not be allowed to "provide by indirection the equivalent of a private damage remedy . . . ." *Transamerica*, *supra* at 158 n.14. Moreover, it is clear from the Supreme Court's opinion that it would not have permitted any private remedy whatsoever under section 215 if there had existed legislative history for section 215 comparable to that discussed *infra* concerning the Trade and Intercourse Act. *Cf. Transamerica*, *supra* at 153-54 with *id.* at 155-56.

The rationale for distinguishing *Transamerica*, however, renders *Leist* inapplicable to this case. The Trade and Intercourse Acts were most certainly adopted before "the great explosion of judicial implied rights." *Leist*, *supra*. Moreover, unlike the legislative history in *Leist* which lent support to the majority opinion in that case, the legislative history of the Trade and Intercourse Acts lends no support whatsoever to the Oneidas' position that a private right of action for damages was contemplated by its sponsors.

The unambiguous language and the absence of the legislative history clearly places the burden upon the Oneidas to demonstrate congressional intent to create a private cause of action for damages. In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), the Supreme Court outlined several factors relevant to determining whether a private remedy is implicit in a statute not expressly providing for one. These factors include:

> (1) Whether the plaintiff is a member of the class for whose "especial benefit" the statute was enacted;
> (2) Whether there is any indication, explicit or implicit, of legislative intent to create or deny such a remedy;
> (3) Whether the implication of a private remedy is consistent with the underlying purposes of the legislative scheme; and
> (4) Whether the cause of action is one traditionally relegated to state law so it would be inappropriate to infer a cause of action based solely on federal law.

Arguably, the Trade and Intercourse Acts were passed for the benefit of Indian tribes or nations. However, as shown in section III(D), *infra*, the Indians were, at most, the incidental beneficiaries of the Act. Rather, the legislation was first and foremost a national security measure. *See, Transamerica*, *supra* at 157. With respect to the second factor identified in *Cort*, there is no

indication either in the Act or in its legislative history that Congress intended to create a cause of action for money damages. Indeed, that Congress established specific penalties and provided for administrative enforcement, see section III(C), *infra*, is indicative that it was cognizant of the need for the remedies and chose not to select a private cause of action for damages as one of them. The implication of a private remedy, although not per se inconsistent with the underlying purposes of the statute, is by no means common to other national security legislation. Finally, an action to recover income profits as a result of the unlawful occupation of one's property is, without doubt, one that is "traditionally relegated to state law". In any event, as the Court in *Touche Ross & Co.*, *supra* at 575, noted concerning the *Cort* criteria:

> "But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in Cort — the language and focus of the statute, its legislative history and its purpose . . . — are ones traditionally relied upon in determining legislative intent."

As shown in sections III(C) and (D), *infra*, there is no evidence of legislative intent to create such a private cause of action. Indeed, the evidence is quite to the contrary.

B. *Implied Rights of Action Under Indian Law.*

One might argue that despite the obvious similarities between this case and those recently decided by the Supreme Court in cases such as *Transamerica* and *Touche Ross* which take a restric-

tive view toward implied rights of action, the Court should follow the "general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people [the Indians] who are wards of the nation. . . ." *DeCoteau* v. *County Court*, 420 U.S. 425, 440 (1975). However, this maxim cannot be seized upon as a license to disregard either congressional intent or generally accepted principles of statutory construction. *Id.* at 444, 447. For example, in *Creek Nation* v. *United States*, 318 U.S. 629, 633 (1942), the plaintiffs argued that the Court should construe language contained in an 1866 treaty that "*the United States guarantees them* [the Creeks] *quiet possession of their country* . . ." as requiring indemnification for reservation lands wrongfully taken by a railroad. Despite the Creeks' claim that a guarantee of "quiet possession" would be meaningless without such an indemnification provision, the Court refused to imply such a remedy absent express language in the treaty. "[W]here reparations were planned, clear language was used." 318 U.S. 634.

In *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), the United States sought to recover interest on taxes illegally collected by Jackson County, Oklahoma from an Indian tribe. The statute in question permitting the recovery of such taxes was silent on the question of interest:

> "Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature [citation omitted], Congress has left us free to take into account appropriate considerations of 'public convenience.'" [citation omitted].

In the opinion of the Court, Jackson County had collected the taxes from the Indians in reliance upon representations of the Federal Government that it was permissible to do so. 308 U.S. at 352-353. Although the United States argued that its Indian

wards should not be penalized for its own lack of diligence, the Court noted that:

> ". . . a choice has to be made between equally innocent victims of official neglect . . . in the administration of the Indian laws.
> "If thereby the Indians are out of pocket, they should not be made whole by putting Jackson [Oneida and Madison] County unfairly out of pocket. The appeal for relief must be made elsewhere."

In *United States* v. *Payne*, 22 Fed. 426 (D. Kansas, 1884), the defendant was charged with illegally settling upon Indian land in violation of R.S. 2118, now 25 U.S.C. § 180 of the Trade and Intercourse Act. The defendant was indicted pursuant to the provisions of section 180 and the United States attempted to collect the $1,000 fine chargeable for such illegal settlements. The court held, however, that section 2124 (the current 25 U.S.C. § 201) which provides that all penalties chargeable under the Act were to be collected in an "action of debt" precluded collection of the fine as part of the criminal process. In the words of the court, "[i]t is an offense created by statute, with a definite penalty attached, and the mode prescribed for enforcing the penalty." 22 Fed. at 427. The mere fact that the subject matter of the Trade and Intercourse Act was Indian affairs was not sufficient to justify a broad and loose interpretation of the statute in fashioning a remedy.

Similarly, in *United States* v. *Hunter*, 21 Fed. 615 (E.D. Missouri, 1884), the United States brought an action to collect the $1,000 penalty set forth in section 177 from the defendant who was charged with illegally negotiating a grazing lease with the Cherokee Indians. In finding that the negotiation of grazing leases did not come within the scope of the section, the court noted that:

> ". . . this being a penal statute, no extended, no strained construction should be put upon the words used in order to include acts not within their plain and ordinary significance." 21 Fed. at 617.[*]

Although the Trade and Intercourse Act was intended to an extent to prevent the improvident disposition of Indian land, its language must be given a "fair and reasonable construction, having in view the plain and ordinary meaning of the terms employed and the evident intent of congress. . . ." 21 Fed. at 616.

Nor would failure to imply a cause of action for damages under the Trade and Intercourse Act render the statute ineffective. Rather, Congress chose alternative means to enforce this law. As Justice M'Lean observed in his concurring opinion in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 512, 576 (1832), "[a]ll persons are prohibited, under a heavy penalty [$1,000 fine], from purchasing the Indian lands; and all such purchases are declared to be void." In addition to these two remedies, then, under the provisions of 25 U.S.C. § 180, the President may expel the unlawful occupiers. In *Beck* v. *Flournoy Live-Stock & Real Estate Co.*, 65 Fed. 30 (8th Cir., 1884), the real estate company attempted to enjoin an army officer from serving notice upon it that the Department of the Interior had determined that its leases of Indian land were void and it would have to vacate the property. According to the court, the defendant entered into the leases "in the belief . . . that the government would be powerless to recover

[*] In *Cort*, it was argued that if the statute in question provides for a criminal penalty, a court should be precluded from implying a civil cause of action. While the Court refused to adopt this argument as a categorical rule to be applied in all instances, it did hold that there must be some statutory basis for inferring a civil cause of action. *Cort*, *supra* at 79-80. To imply a private cause of action for damages under section 177 without any statutory basis would, most certainly, be contrary to the principles enunciated in both *Cort* and *Hunter*.

possession of the demised premises . . . except by bringing a multitude of suits in ejectment." 65 Fed. at 37. The court refused to force the government to employ the "barren remedy" of ejectment and permitted the United States to take whatever action necessary to "vindicate its rights". *Id.*

Following the Eighth Circuit's decision upholding the Interior Department's conclusion that the leases in *Beck* were void, the case was remanded to the District Court and in *United States* v. *Mullin*, 71 Fed. 682 (D. Neb., 1895), the court held that "*the executive department of government* is charged with the duty to do whatever may be necessary to protect the Indians in the use and occupancy of their lands, and to oust intruders therefrom; . . ." 71 Fed. at 686-687. (emphasis supplied). The court then went on to hold that the predecessor of 25 U.S.C § 180 clearly places the responsibility for this task in the hands of the executive branch:

> "The judicial branch hears, decides and declares its judgment upon questions brought before it; but when action is needed to enforce the judgment of the court, ordinarily, the appeal is to the executive powers of the government." 71 Fed. at 688.

Case law interpreting other penal provisions of the Trade and Intercourse Act also demonstrates that the courts tend to follow the penalties prescribed by the statute and not fashion their own remedies. For example, in *United States ex rel. Whitehorse* v. *Briggs*, 555 F.2d 283 (10th Cir. 1977), the United States brought an action for trespass of cattle upon Indian land. Section 179 of Title 25 provides a penalty of $1.00 for each animal found trespassing. Rather than applying a common law measure of damages, the court made an award based precisely on section 179 standards.

As these cases demonstrate, courts will not deviate from well established canons of statutory construction and imply remedies not authorized by law simply to benefit Indians. Indeed, the judicially acknowledged penal nature of the Trade and Intercourse Act precludes this Court from ordering statutorily unauthorized relief. Simply put, there is nothing in the relevant case law which would warrant a departure from the basic principles laid down by the Supreme Court in determining whether a cause of action for damages may be implied under the Trade and Intercourse Act merely because the subject of that Act happens to be Indian affairs.

C. *Statutory Analysis of the Trade and Intercourse Acts.*

Having reviewed these general principles, we must begin our analysis "with the language of the statute itself." *Transamerica*, *supra* at 152. Section 177 of Title 25, United States Code provides in relevant part:

> "That no purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars. . . ."

The cognate provisions of the 1793 Trade and Intercourse Act which were in effect at the time the Oneidas conveyed the subject land to the State of New York read:

"That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed. . . ."[8]

As is readily apparent from the statutory language, the 1793 Act provides for two and only two remedies in the event of a violation of its provisions. First, a fine of $1,000 may be imposed upon *the violator* and second, the violator may be imprisoned for up to twelve months. No mention whatsoever is made of any cause of action for damages. Legislative silence in this regard must be considered "purposeful" and strongly suggests that Congress *did not* intend to create such a cause of action. *See Kissinger, supra* at 4228. Similarly, *Transamerica* clearly compels the conclusion that an action for money damages such as is claimed by the Oneidas is inappropriate. This conclusion is supported not by just the clear and unambiguous language of the non-alienation *provision* of the 1793 Act but by previous and subsequent versions of this section, the entire statutory scheme of the Trade and Intercourse Acts, and the legislative history and circumstances surrounding enactment of this legislation.

The first Trade and Intercourse Act became law on July 22, 1790. Act of July 22, 1790, Ch. 33, 1 Stat. 137 ("1790 Act"). Although the 1790 Act contained but six substantive sections, it established a broad regulatory scheme to govern contact between

the white and Indian populations. Section 1 of the Act required any person wishing to trade with the Indians to obtain a license for that purpose from the Superintendent of Indian Affairs whose office was housed within the War Department. As a condition of obtaining such a license, the trader was required to post a bond "in the penal sum of one thousand dollars, payable to the President of the United States. . . ." In the event that the trader violated any of the provisions of the Act or rules and regulations promulgated thereunder, the Superintendent was authorized to "put in suit such bonds as he may have taken, immediately on the breach of any condition in said bond. . . ." Section 2, 1790 Act. In addition to regulating the activity of licensed traders, the Act provided that any unlicensed traders found doing business with Indian tribes would forfeit such merchandise as was in their possession, one half the proceeds of which would go to the United States, the other half to the benefit of the person initiating the prosecution of the unlicensed trader. Section 3, 1790 Act.

Although the 1790 Act established substantial penalties for violations of its provisions regulating trade, section 4 which was the predecessor of section 177 established no such penalties for conveyances made without the consent of the United States. Rather, section 4 simply declared that such conveyances would be void. Congress' failure to prescribe any penalty for a violation of this section was consistent with the recommendations of Secretary of War Henry Knox who, in his report of July 15, 1789, urged the Congress to enact a "declarative law" recognizing the right of the Indians to possess their lands subject only to divestment by the United States. *American State Papers: Indian Affairs*, Vol. I. at 53-55 (Washington, D.C.: 1834). Section 4 was therefore simply a declaratory act devoid of any judicially enforce-

able remedies or penalties. This conclusion is supported by the fact that in those provisions of the Act dealing with trade, the Congress chose to establish specific penalties to deal with violation. The legislative silence in section 4 on remedies is thus particularly significant when contrasted with the clear expressions of congressional intent in sections 1-3. "Obviously, . . . when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Touche Ross*, *supra* at 571, *Transamerica*, *supra* at 155.

The 1790 Act was limited to just a two-year life span and, on March 1, 1793, Congress enacted a new Trade and Intercourse Act. Act of March 1, 1793, Ch. 19, 1 Stat. 329 ("1793 Act"). The 1793 Act was considerably more detailed than the 1790 version both in terms of its substantive coverage and its enforcement provisions. For example, unlicensed traders, in addition to having their merchandise subject to forfeiture, were now also subject to a fine of up to $100 and imprisonment up to thirty days. Section 3, 1793 Act. In addition, the purchase of horses from Indians by a trader without a special license obtained from the Superintendent of Indian Affairs was forbidden upon pain of forfeiture of his bond and the imposition of up to a $100 fine. Those who purchased a horse with knowledge that it originally belonged to an Indian also were subject to forfeiture of the value of the horse. Section 6, 1793 Act.

For the first time, the 1793 Act specifically addressed the issue of the remedies or penalties available to punish and deter those who encroached upon Indian lands. Whereas the 1790 Act was simply a "declarative law", the 1793 Act made it a misdemeanor punishable by a fine not exceeding $1,000 and up to 12 months in prison to purchase any interest in Indian land without the approval of the United States. Section 8, 1793 Act. Realizing that the threat of criminal sanctions for illegal purchases could be insufficient to deter illegal land acquisitions, the Congress also made it a crime to settle upon Indian land punishable by a fine

of up to $1,000 and 12 months in prison, and gave the President authority:

> ". . . to take such measures, as he may deem necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon." Section 5, 1793 Act (predecessor to 25 U.S.C. § 180).

Section 12 of the 1793 Act dealt specifically with the disposition of the fines and forfeitures collected under the Act. If the prosecution were initiated by an informant, he would receive one half the total collected, the other half going to the United States.[5] If the United States instituted the prosecution, it would be entitled to all the proceeds collected as a result of any fines and forfeitures.

The changes made by Congress in 1793 clearly demonstrate not only an awareness of a variety of remedies to enforce the provisions of the Act but of the need to spell out these remedies directly in the statute. Enforcement responsibilities rested primarily with the administrative apparatus established within the War Department, i.e., the Superintendent of Indian Affairs and, secondarily, upon the use of informants who were enticed to initiate prosecutions by the prospect of receiving half the proceeds collected. Rather than authorizing private damages actions to

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[5] At common law suits for penalties were often prosecuted by informants. According to the court in *United States* v. *Stocking*, 87 Fed. 857, 861 (D. Montana, 1898), the right of an informant to sue for a penalty was questionable unless authorized by statute. The Trade and Intercourse Act specifically adopted this practice as an aid in enforcement.

That Congress should expressly set forth in the statute the right of an informant to bring suit to recover penalties accruing under the act is "another clear indication that Congress knew how to confer a private right of action when it wished to do so." *Transamerica*, *supra* at 156 n.13.

enforce the Act, Congress chose to rely upon criminal penalties, and the political and military power of the President. In light of the variety of remedies established by the 1793 Act, congressional silence on the question of a private right of action for money damages cannot be viewed as accidental. Significantly, it was the 1793 act that was in effect at the time the Oneidas conveyed the subject land to the State of New York.

On May 19, 1796, Congress once again reenacted a new version of the Trade and Intercourse Act. Act of May 19, 1796, Ch. 30, 1 Stat. 469 ("1796 Act"). While many of the provisions of the 1796 Act were similar in nature to those contained in the 1793 Act, a few items are worthy of comment. For example, the 1796 Act strengthened the provision dealing with illegal settlements on Indian land by explicitly recognizing the right of the President to employ military force to remove such intruders. Section 5, 1796 Act. All "right, title, or claim" to land occupied by such illegal settlers was subject to immediate forfeiture to the United States upon conviction of the offender in a criminal proceeding. Also, for the first time, Congress specifically defined "Indian Country" and forbade any person from crossing over the boundary line so established to hunt or graze animals upon pain of incurring a $100 fine and up to six months in prison. Section 2, 1796 Act. All of these measures, including the non-alienation provision, comprised a comprehensive congressional effort to deter encroachments upon Indian land. Violation of any of these provisions constituted a "crime or offence" and the "fines, and duration of imprisonment" established by the 1796 Act were the "punishment" by which the United States hoped to deter such violations. Sections 17, 18, 1796 Act.

Congress enacted the fourth Trade and Intercourse Act in 1799. (Act of March 3, 1799, Ch. 46, 1 Stat. 743 ("1799 Act")). However, the 1799 Act was, for all practical purposes, identical to the 1796 Act.

In 1802 the Congress once again reenacted the Trade and Intercourse Act. (Act of March 30, 1802, Ch. 13, 2 Stat. 139 ("1802 Act")). While Congress made little in the way of substantive change from the 1799 Act, it again demonstrated a keen awareness of the issue of remedies. In particular, Congress deleted the provision of the 1796 Act requiring forfeiture of all "right, title, or claim" of those found illegally settling upon Indian land. Section 5, 1802 Act. The Congress also, for the first time, specified "[t]hat the amount of fines, and duration of imprisonment, directed by this act as punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, *not exceeding the limits prescribed*, in the discretion of the court, before whom the trial shall be had; . . ." (emphasis supplied).

Although the Trade and Intercourse Act was amended in both 1816 and 1822, the present day version of the statute became law on June 30, 1834. Act of June 30, 1834, Ch. 161, Stat. 729 ("1834 Act"). Section 10 of the 1834 Act gave the Superintendent of Indian Affairs and his agents authority to remove all persons found illegally in Indian Country and the President was authorized to employ military force to assist in their removal. Section 12, which restricted the rights of the Indians to alienate their property, was also slightly amended by deleting the language making it a misdemeanor to purchase Indian land without the consent of the United States. Although the $1,000 fine was retained, the provision for imprisonment was dropped. As a result of this amendment, section 27 of the 1834 Act was added which provided "[t]hat all penalties which shall accrue under this Act, shall be sued for and recovered in an action of debt, in the name of the United States, . . . the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first initiated on behalf of the United States, in which case the whole shall be for their use." Again, Congress not only addressed the types of remedies needed to enforce the Trade and Intercourse Act but the manner in which these remedies would be implemented.

The statutory analysis of the predecessor statutes to the present Trade and Intercourse Act leads to only one conclusion: Congress did not intend to create a cause of action for damages as a remedy for violations. First, the Acts are not only silent on this issue but established alternative remedies, i.e. criminal penalties. Second, the Acts establish administrative and political enforcement mechanisms via the Superintendent of Indian Affairs and the War Department. Third, additional penalties are established in other sections of the Acts to prevent illegal settlements, and provision is made for the removal of such illegal settlers upon order of the President. Fourth, the Acts explicitly authorize "informants" to initiate actions to recover the statutory penalties as an aid to enforcement. Fifth, that the United States was entitled to fifty percent of all fines and forfeitures received in suits initiated by informants and the entire amount in actions which itself initiated further demonstrates that a private remedy is not consistent with the underlying statutory scheme.

The multiplicity of remedies contained in the Acts clearly illustrates a congressional awareness of the variety of tools available to achieve compliance. Moreover, the Trade and Intercourse Acts are penal in nature and penal statutes are to be strictly construed. *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170 (1919). On virtually every count, the Trade and Intercourse Acts are indistinguishable from the statute scrutinized by the Supreme Court in *Transamerica*. For these reasons, the result in this case must follow the dictate of the nation's highest court — no private cause of action for damages can be implied under the Trade and Intercourse Act.

D. *The Political and Legislative History of the Trade and Intercourse Act.*

1. Political History.

It is impossible to understand the true meaning of the Trade and Intercourse Acts without examining the historical context in which they arose. As the Second Circuit noted recently in *Mohegan Tribe* v. *State of Connecticut*, No. 80-7348, Slip Op., December 17, 1980, at 602, "the courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here [the Trade and Intercourse Acts]." Such an inquiry by the Court is particularly critical in fashioning a remedy which will be consistent with and authorized by the relevant statutory provision. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587 (1977); *Decouteau* v. *County Court*, *supra* at 444-445 (1975). As the Supreme Court noted in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978):

> "These instruments [legislation and treaties relating to Indians] . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

As explained above, the Trade and Intercourse Act was first enacted on July 23, 1790.* This section formed but a part of a comprehensive piece of legislation designed to regulate trade and intercourse with the Indian nations which, at the time, held sway over a considerable portion of the new nation which, less than

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*See Chap. 33, 1 Stat. 137, "An Act to regulate trade and intercourse with the Indian tribes."

a decade before, had won its independence from the British Crown. Also, as explained above, the 1790 Act was subsequently reenacted and amended several times over the next forty-five years.[7] However, the 1834 version of this act has remained essentially intact to the present day.

The rationale underlying this legislation was a simple one—the maintenance of peace between the United States and the Indian tribes residing within its boundaries. According to the foremost authority on the Trade and Intercourse Acts, Prucha, Francis Paul, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*. (Cambridge, Mass., Harvard University Press, 1962) ("Prucha"), at 3:

> "The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. *The intercourse acts were thus restrictive and prohibitory in nature — aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility.*" (emphasis supplied).

The Trade and Intercourse Acts embodied an assertion of federal supremacy in the conduct of Indian affairs for the purpose of securing peace with the native inhabitants of the continent. Such an assertion of centralized authority in this sphere was by no means unique, however. See *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 512 (1832). Indeed, the British Crown throughout the course of its colonial tenure in North America frequently attempted to as-

[7]The Trade and Intercourse Act was reenacted in 1793, 1796, 1799, 1802 and 1834.

sume similar hegemony over Indian affairs. One instrument of British control was the Proclamation of 1763 which, according to *Prucha*, *supra* at 21, was:

> ". . . only a means of providing for regulated acquisition of the Indian lands in a way that would not stir up the resentment of the Indians as had the haphazard and often fraudulent methods employed by the individual colonies."

Following Washington's victory over Cornwallis at Yorktown and the conclusion of the Treaty of Paris which granted the colonies their independence from the British Crown, political authority became fragmented under the Articles of Confederation. Although decentralization was a natural reaction to the years of colonial denomination, this policy was ill-suited to the effective management of affairs of state. Dissatisfaction with the Articles of Confederation not only led to the adoption of the Constitution but to a reevaluation of American Indian policy as well. According to *Prucha*, *supra* at 38, in August 1787 a congressional committee investigating this subject:

> ". . . demanded that Congress give serious attention to the repeated complaints of the Indians about encroachments upon their lands, 'as well because they [the encroachments] may be unjustifiable as on account of their tendency to produce all the evils of a general Indian war on the frontiers'."[8]

[8]Chief Justice John Marshall, speaking on behalf of the Court in *Worcester* v. *Georgia*, *supra* at 552 (1832) shared the view of his colleagues in the other branches of government that ". . . the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their [Indian] country, from encroachments on their lands, and from the acts of violence which were often attended by reciprocal murder."

In the early years of the Republic, there were those who doubted that the so-called "experiment in democracy" would survive the pressures from both at home and abroad. The Founding Fathers were acutely aware of the new Republic's precarious existence and, for this reason, their first priority was peace on the frontier. Indeed, it is Secretary of War Henry Knox who, along with President Washington, are viewed as the architects of the first Trade and Intercourse Act. *Prucha, supra* at 44. Knox's purpose in promoting this legislation was to protect the Indians and their lands from unscrupulous whites — not because this was right but because it was necessary to conciliate the Indians in order to preserve the peace. As Secretary Knox noted in a report dated June 15, 1789, *American State Papers: Indian Affairs*, Vol. I at 53:

> "As the great source of all Indian wars are disputes about their boundaries, and as the United States are, from the nature of the government, liable to be involved in every war that shall happen on this or any other account, it is highly proper that their authority and consent should be considered as essentially necessary to all measures for the consequences of which they are responsible."

The Trade and Intercourse Acts constituted "[a]n 'efficacious provision' for punishing those who infringed Indian rights . . . and thus endangered the peace of the nation." *Prucha, supra* at 46.

The Knox-Washington view of the Trade and Intercourse Acts as a national security measure was not confined to only the ruling Federalist Party. The leader of the rival Democratic-Republican Party, Secretary of State Thomas Jefferson, shared the Federalist perspective on Indian affairs:

> "I hope too that your admonitions against encroachments on Indian lands will have a beneficial effect — the U.S. find an Indian war too serious a thing, to risk incurring one merely to gratify a few intruders with settlements which are to cost the other inhabitants of the U.S. a thousand times their value in taxes for carrying on the war they produce. I am satisfied it will ever be preferred to send armed force and make war against the intruders as being more just and less expensive."

Prucha, supra at 139, quoting Thomas Jefferson to David Campbell, March 27, 1792.

Although the Trade and Intercourse Acts were intended to promote peace and security on the frontier, they were to do so by regulating, not prohibiting, the transfer of Indian lands. The Act of July 22, 1790, and subsequent versions thereof embodied "[t]he basic policy of the United States . . . that white settlement should advance and the Indians withdraw. Its [the United States'] interest was primarily that this process should be as free of disorder and injustice as possible." *Prucha, supra* at 186. As President Washington remarked regarding the Trade and Intercourse Act in an address to the Congress in 1791:

> " Among the most important of these [objectives] is the defense and security of the western frontiers. To accomplish it on the most humane principles, was a primary wish.
>
> Accordingly . . . effectual measures have been adopted to make these of a hostile description sensible. . .
>
> It is sincerely to be desired, that all need of coercion in [the] future, may cease and that an intimate intercourse may succeed. . .

> In order to do this, it seems necessary-. . . That *the mode of alienating their lands, the main source of discontent and war, should be so defined, and regulated as to obviate imposition* and as far as may be practicable, controversy concerning the reality and extent of the alienations which are made. That commerce with them should be promoted under regulations . . . And, that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating their rights, *shall infringe the treaties, and endanger the peace of the Union.*" *American State Papers*: Foreign Relations, Vol. 1, p. 16. (emphasis supplied)[9]

Thus, the purpose of the Trade and Intercourse Acts was to promote peace and security on the frontier. In fact, "[t]he laws were not 'Indian' laws; they touched the Indian only indirectly as they limited him in his trade and his sale of land. The legislation was, rather, directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties made with the Indians." *Prucha, supra*at 48.

This brief excursion into the political history of the Trade and Intercourse Acts is not intended to demonstrate that the prevention of improvident Indian land transfers were not a goal of these laws. *See United States* v. *Southern Pacific Transportation Co.*,

[9]One scholar has offered the following assessment of President Washington's Indian policy:

> "The suggestions of Washington and Knox had practical results in the early years of the new government. Through a series of trade and intercourse acts direct efforts were made to force American citizens to observe the boundaries established by treaties with the Indians. It was hoped to prevent continued warfare by allowing white-Indian contact only under strict regulation." Horsman, Reginald, *Expansion and American Indian Policy, 1783-1812*. (East Lansing, Michigan: Michigan State University Press, 1967).

543 F.2d 676, 698 (9th Cir. 1976). However, it would be historically inaccurate to maintain that the Acts were passed for the "especial benefit" of the Indians. As the Second Circuit remarked in *Mohegan Tribe, supra* at 603-604, "the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them" and "contemporary attitudes have colored our views of the original motives behind American Indian policy. . . ." Rather, "peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along frontiers, were primary objects of the Act's land provisions." *Mohegan Tribe, supra* at 604.

2. Legislative History.

The legislative history underlying the Trade and Intercourse Act is extremely sparse by today's standards. Some evidence does exist, however, regarding congressional opinion on the question of remedies to enforce the provisions of the Act.

The 1790 Act contained no penalty provision to enforce the substantive provisions of the law. As a result of this inadequacy, President George Washington, in his Third Annual Address delivered on October 25, 1791, urged the Congress "that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating their [Indian] rights, shall infringe the treaties and endanger the peace of the union." "Third Annual Address of President George Washington", Richardson, James (ed.), *Messages and Papers of the Presidents*, Vol. I at 105 (Washington, D.C.: 1896). Similarly, in a speech to Congress on November 6, 1792, President Washington stated that "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier. . . ." Speech of President George Washington, 2d Cong., 2d

Sess., November 6, 1792. *American State Papers: Indian Affairs*, Vol. I, *supra* at 19.

In response to the President's pleas, the 1793 Act, as originally introduced, proposed that a fine of $4,000 and 12 months imprisonment be imposed upon those who violated the Act's non-alienation provision. Acts and Resolutions of the Congress, 2d Cong., 1st Sess., Library of Congress, Washington, D.C. The Act was subsequently amended by the House of Representatives which reduced the $4,000 fine to $1,000. See Section 8, 1793 Act. There is no mention, however, in the original 1793 Act as submitted of any private right of action to enforce the non-alienation provision. Apparently, the Congress viewed a $1,000 fine and 12 months imprisonment as sufficient to enforce the provisions of the Act. Indeed, the reduction of the proposed fine from $4,000 to $1,000 demonstrates that Congress held a restrictive rather than expansionary view towards the issue of enforcement.

Despite the strengthening of the Trade and Intercourse Act in 1793, on January 30, 1794 President Washington complained that "[e]xperience demonstrates that the existing legal provisions are entirely inadequate. . . ." *American State Papers*, *supra* at 472. Thus, the issue of enforcement again surfaced in the congressional debates leading up to the passage of the 1796 Act. In particular, the House of Representatives vigorously debated the wisdom of the clause contained in section 5 of the 1796 Act which provided that any person settling upon Indian land shall "forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid. . . ." At issue before the House was whether to retain this forfeiture clause or, alternatively, to strike it and rely exclusively upon a $1,000 penalty and 12 months imprisonment to deter illegal encroachments upon Indian land. Annals of Congress: The Debates and Proceedings in the Congress of the United States, 4th Cong., 1st Sess., Dec. 7, 1795-June 1, 1796 ("Annals"), April 9, 1796 at 893-904.

The proponents of the forfeiture clause argued that previous versions of the Trade and Intercourse Act had proven totally ineffectual in preventing illegal encroachments upon Indian land. In the words of Congressman Crabb, "[i]f the clause was struck out, the bill would be of no use; it would stand as before." *Annals* at 897. The forfeiture clause was viewed as a virtual prerequisite to reducing friction on the frontier between whites and Indians which could lead to a general Indian war. *Annals* at 901. As Congressman Hillhouse noted, *Annals* at 898:

> ". . . it was intended to restrain those daring inhabitants, who declare that, in defiance of Treaties and laws, they will go into the Indian lands, a circumstance which cannot fail to excite the resentment and retaliation of the Indians, which will fall not upon the offenders, for they will be no more found than the wolves, but upon the innocent frontier inhabitants, their wives and children."

The proponents of the forfeiture clause did not wish to rely upon civil process to enforce its provisions. Rather, they argued that "nothing but a superior military force would prevent them [whites] from taking possession of Indian lands." *Annals* at 899. Remarks of Congressman Hillhouse, quoting letter from Governor Blount to Secretary of War, December 19, 1795; see also Remarks of Congressman Gallatin, *supra* at 902-904. As Congressman Gallatin remarked, *supra* at 903:

> "How was it supposed they should drive these people from the land? If Government was so weak as not to prevent them from going upon it, how could they recover the forfeiture and get possession of the land after those people were upon it? Was it supposed that if these persons were not deterred by the present law, which inflicts a penalty of one

thousand dollars and imprisonment one year that they would be deterred by the present law? No such thing. They would pay 'if Government are not strong enough to prevent us from going upon the land, they will not be able to drive us from it.'"

In Congressman Gallatin's opinion, only a strong military was adequate to the task of removing those illegally occupying Indian lands. However, "as to any legal restraints, the present provisions by law were sufficient, or if the fines were not large enough, they might be made larger."[8] *Annals* at 904.

Opponents of the forfeiture clause argued that forfeiture constituted an irrevocable penalty and that under certain circumstances mitigation might be appropriate. Remarks of Congressman Nichols, *Annals* at 893. This argument proved to be appealing and, on April 9, 1796, the forfeiture clause was struck from the Act. The victory of the opponents of the forfeiture clause was, however, short-lived and, on April 11, 1796, it was reinstated into the Act.

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[8]The view that the encroachment of whites upon Indian lands could be halted only through the use of military force was not a novel one. On July 7, 1789, Secretary of War Knox advised President Washington that "[t]he angry passions of the frontier Indians and whites are too easily inflamed by reciprocal injuries, and *are too violent to be controlled by the feeble authority of civil power*." *American State Papers: Indian Affairs*, Vol. 1 at 53. (emphasis supplied) Similarly, on January 4, 1790, Knox again wrote Washington stating that "[n]o peace with the Indians can be preserved, *unless by military force*. *American State Papers*, *supra* at 60. (emphasis supplied). Finally, as late as December 29, 1794, Knox continued to maintain that an "adequate remedy" to prevent the illegal occupation of Indian land would entail not judicial remedies, but a line of military posts on the frontier garrisoned by regular troops. Knox to Washington, December 29, 1794. *American State Papers*, *supra* at 544. As these legislative debates indicate, the members of Congress apparently shared Knox' perspective on this issue.

While the congressional debate focused on the forfeiture clause, it also sheds considerable light on the legislative intent underlying the non-alienation provision. In the first instance, forfeiture applied to persons owning land illegally conveyed in violation of the present section 177. As Congressman Gallatin remarked, the object of the clause was "to make a forfeiture of a real estate for a misdemeanor." *Annals* at 902. Section 5 of the 1796 Act did not explicitly establish settling upon Indian land as a misdemeanor whereas section 12, the non-alienation provision, did. Second, the debate clearly reveals that to the extent the Federal Government wished to rely upon the judicial system to enforce the provisions of the Act, the method chosen was forfeiture, fines and imprisonment, not court-ordered civil damages and ejectments. Rather, Congress chose to rely upon criminal prosecutions to punish, and the political and military powers of the Executive to dispossess those illegally occupying Indian land. Finally, it is clear that in approving the forfeiture clause, Congress did not do so for the "especial benefit" of the Indians. As Governor William Blount of Tennessee wrote to the Secretary of War, "[i]t is . . . not to be denied, that he who preserves peace with Indians thereby serves the Indians; but it is equally true that, by that act, he, in a much *greater degree*, *serves his fellow-citizens*." Blount to Sec. of War, December 19, 1795, *Annals*, *supra* at 899. (emphasis supplied)

The forfeiture clause contained in section 5 of the 1796 Act was deleted when Congress reenacted the Trade and Intercourse Act in 1802. Section 5, 1802 Act. While there is no direct legislative history available explaining this deletion, certain inferences can be drawn from the debate on this clause which occurred in 1796. In particular, it will be recalled that the opponents had argued that the presence of this clause prevented the Executive from considering circumstances which might mitigate against the imposition of the extreme penalty of forfeiture. The fact that the clause was deleted in 1802 indicates that what since 1796 had

been a mandatory result of a criminal conviction was now viewed by Congress as discretionary. Indeed, section 5 of the 1802 Act permits the President "to take such measures . . . *as he may judge necessary*" to remove persons illegally occupying Indian lands.

This view that Congress preferred to rely on criminal prosecutions and the power of the military rather than the civil authority of the courts to enforce the Trade and Intercourse Act is consistent with subsequent administrative interpretations of the 1802 Act by those officials charged with its enforcement. For example, on January 24, 1812, the Indian agent for the Cherokee nation, Return Jon Meigs wrote Governor William Blount of Tennessee stating that "[j]udicial authority is stated, the duty of the military forces is pointed out in aid of that authority, by which it appears that without the aid of military force there was no power competent for apprehending and punishing offenders against that act [Section 5 of the 1802 Trade and Intercourse Act]." Records of the Superintendencies and Agencies of the Cherokees, National Archives, M 208, r5. Meigs further noted that:

> ". . . at present I presume there is no law making civil process legal within the limits of the Indian boundary and as the regular troops are not in this quarter, there is no power competent to remove or bring out citizens who have taken refuge in the Indian Country for either civil or criminal offenses."

As Indian agents were the principal officials charged with administering and enforcing the provisions of the Trade and Intercourse Acts, their views and interpretations of the law should be accorded deference similar to that which is accorded administrative agencies today by the courts.

Unlike previous versions of the Act, the 1834 version of the Trade and Intercourse Act was accompanied by two legislative reports outlining the congressional rationale behind the legislation. See Report on Regulating the Indian Department, H.R. Rep. 474, 23rd Cong., 1st Sess., May 20, 1834; Senate Doc. No. 72, Report from the Secretary of War, 20th Cong., 2d Sess., February 10, 1829. Unfortunately, neither of these two lengthy reports addresses the issue of remedies in general, or a private right of action in particular with respect to enforcement of the Act's non-alienation provision.

In short, there is no evidence in any of the legislative or political history currently available to support the Oneidas' position that the Trade and Intercourse Act authorizes a private right of action for damages. On the contrary, the legislative history of the Acts, and in particular the congressional debate concerning the mandatory forfeiture provision to the predecessor version of 25 U.S.C. § 180, clearly indicates that Congress did not intend judicially-mandated civil damages or ejectments of persons illegally occupying Indian lands.[11] This legislative history strongly suggests that apart from the $1,000 penalty established, enforcement of the Act rests squarely within the discretionary authority of the Presi-

[11] Although the Oneidas are ostensibly only seeking money damages in this action and not the return of the subject land, they may well argue that the language in *Transamerica*, *supra* at 154 that "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere" implies a private right of action to recover the subject land. Unlike the legislative history of the statute scrutinized in *Transamerica*, however, which was silent on this issue, the legislative history of the Trade and Intercourse Acts and subsequent case law indicate that responsibility for such a determination of voidness and any remedial response attendant thereto resides, at least in the first instance, in the hands of the Executive. *See Beck* v. *Flournoy Live-Stock & Real Estate Co.*, *supra*; *United States* v. *Mullin*, *supra*. Moreover, under the political question doctrine, the Court is not even empowered to render a simple declaration of rights of the parties to such a dispute over title to allegedly Indian land. See discussion § IV, *infra*.

dent and not upon "the feeble authority of civil power." As the Supreme Court remarked in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977), courts "must be wary against interpolating . . . [their] notions of policy in the interstices of legislative provisions." Thus, the plain language of the Act, a review of predecessor statutes and other legislative history which exists concerning the Trade and Intercourse Act compels the conclusion that no implied remedy for damages was intended — indeed, that no implied remedies of *any* kind were intended. This conclusion is also supported by contemporaneous judicial opinion. For example, in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831), Chief Justice Marshall stated that "after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and *cannot maintain an action in the courts of the United States*." (emphasis supplied). Chief Justice Marshall's opinion clearly reflects the attitude of the time — an attitude which is totally inconsistent with the notion that Congress intended to imply a private cause of action under the Trade and Intercourse Act. Indeed, it was not until June 2, 1924 that Congress declared that all non-citizen Indians born within the territorial limits of the United States were declared to be citizens. 43 Stat. 253 (1924). Prior to this date, access to the courts by Indians was severely restricted. 1 *Moore's Fed. Prac.* ¶ 0.74 [2.-2], 707.24-707.25 (2d ed. 1980). Thus, given that as late as 1884 the Supreme Court was of the opinion that tribal Indians were not to be accorded citizenship by the Fourteenth Amendment, one cannot readily impute an intent to Congress almost a century earlier to create a private right of action on their behalf. *Elk* v. *Wilkins*, 112 U.S. 94, 99-109 (1884); see also *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351, 356 (1926), in which the Court noted the necessity of jurisdictional legislation in order for Indian tribes to gain access to the federal courts. Such jurisdictional legislation was obviously non-existent at the time Congress considered the Trade and Intercourse Acts (1790-1834).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs,	
v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants. Third-Party Plaintiffs,	
v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

ORDER [OF MARCH 2, 1981]

EDMUND PORT, Judge

After due consideration of the plaintiffs' motion to strike Section III of the defendants' "PRE-TRIAL MEMORANDUM . . .

ON THE ISSUE OF REMEDIES" and the defendants' opposition, it is

ORDERED, that Section III of the defendants' memorandum on the issue of remedies entitled, "THE ONLY REMEDY PROVIDED FOR BY THE TRADE AND INTERCOURSE ACT IS A ONE THOUSAND DOLLAR CRIMINAL FINE" is hereby stricken as being outside the scope of issues set for briefing in this Court's pretrial order of June 25, 1980 and, further, as being barred by the law of the case.

Alternatively, treating the said Section III as a motion to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted, it is hereby

ORDERED, that the motion to dismiss be and the same hereby is denied and it is further

ORDERED, that the pretrial order dated June 25, 1980 be modified:

1. By extending the time to file initial memoranda as provided in stipulations of the parties, and
2. By extending the time for the filing of reply memoranda until 14 days from the date of this order.

In all other respects said pretrial order is to remain in effect.[1]

/s/ Edmund Port

Senior U.S. District Judge

Dated: March 2, 1981
Auburn, New York

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[1] The deletion of the limiting phrase "under the political question doctrine" from the second stipulation extending the time for briefing was neither called to my attention nor noticed by me. However, since "the issues raised in the defendants' brief do not go beyond the order even as originally phrased"," the deletion is without significance. To remove any doubt the original phraseology is restored.

[2] Defendants' Opposition to Plaintiffs' Motion to Strike, p. 7.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,
v.
THE COUNTY OF ONEIDA, NEW YORK, et al.,
Defendants.

Civil Action No. 70-CV-35

Objection.

Now comes the Counties of Madison and Oneida, New York, and object to the Order of the Court (Port, J.) dated March 2, 1981, striking Section III of the defendants' Memorandum on the Issue of Remedies and, alternatively, denying that section as if it were a motion to dismiss.

COUNTY OF ONEIDA, NEW YORK
COUNTY OF MADISON, NEW YORK
By their attorneys,
Allan van Gestel
GOODWIN, PROCTER & HOAR,
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: March 9, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

[TRANSCRIPT OF PORTION OF HEARING BEFORE DISTRICT COURT ON MAY 18, 1981, DURING WHICH THE COURT STATES ITS REASONS FOR DENYING THE COUNTIES' MOTION RELATING TO THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE]

THE COURT: Miss Locklear, Gentlemen, I think it has probably become apparent from the comments made during the course of the argument what my reaction is to the political question doctrine as applicable to this case. I believe my philosophy has been usually the District Court's job is to decide and

in deciding to briefly tell the parties that did not prevail the reasons in my mind why the decision is as it is. The prevailing party, I think, could care less, usually. If my remarks on the record now, giving you my reasons for deciding as I am, seems somewhat disjointed, it is probably because they are. I have jotted down notes here and there as we have come along and as I have examined your Briefs. The Defendants, it seems to me, have argued principally that this is not a justiciable issue, that it is a political question which the Court lacks power to deal with under the separation of powers. Initially the Defendant took the position that the, and takes the position in its memoranda now, that the Intercourse Act in 1793, which they claim to be applicable to this transaction, by including a provision for a $1,000 forfeiture of penalty and imprisonment of up to 12 months for a violation of the Act provided an exclusive remedy for a violation. They reached that conclusion based on the theory that seems to incorporate more of a pre-emption doctrine as indicated in the recent case of City of Milwaukee against Illinois in the Supreme Court decided April 28th, 1981 than any other. I depart from the Defendant's analysis of that case as it applies to the Oneida case. In that case, the Court, initially in treating the case earlier on a question of original jurisdiction, while finding that the Court lacked jurisdiction nevertheless held that a Common Law claim of nuisance was asserted and that in spite of the presence in various statutes of a number of regulatory provisions regarding the subject matter. Subsequently when City of Milwaukee came up for the second time in which the Court held, in effect, that the area is a matter of Federal concern but had been pre-empted by the Congress, the Congress had by that time enacted a comprehensive plan or program to control the pollution which was the subject matter of the statute Counsel for the Defendants recognized that it was the comprehensiveness of the plan that resulted in the pre-emption by Congress. Congress laid down

in minute detail the conditions that would control leaving nothing for the Court to promulgate, and when the Court went beyond the parameters fixed by Congress, the Supreme Court merely held that Congress had taken the entire area unto itself. Now, to apply that kind of reasoning to a simple statement that merely says, and I am reading from Section 8 of the Trade and Intercourse Act with the Indians 1783, "and be it further enacted no purchase or grant of lands or or have any title or claim thereto from any Indians or nation or tribe of Indians within the bounds of the United States shall be, have any validity in law or equity unless the same be made by a treaty or convention entered into pursuant to the Constitution; that ends the quote. I can't attribute to that simple statement a comprehensive plan for the disposition of claims of invalidity. I think what the Congress has done is establish a policy as they said for the protection of the Indians who were regarded as wards of the United States, regarded like children a policy of protection and it's hard for me to attribute to the Congress a broad statement protecting land transfers of Indians to the extent of making them absolutely void, action of no validity or equity, and yet affording to the beneficiaries of that policy no remedy. Defendants contend that the remedy, that the statute declares a violator to be a miscreant and makes the conviction punishable by a fine not exceeding $1,000 and imprisonment not exceeding 12 months. I think that the crime is broader than what makes a transfer invalid. It's the transfer without the consent in substance without the consent of the United States that becomes invalid, but the misdemeanor consists of even negotiating successfully or unsuccessfully, it's a treaty directly or indirectly for the title of purchase successfully or unsuccessfully and like all crimes, of course, the fine goes to the United States, although in this case it's pointed out if there is an informant one half goes to the informant similar to the Custom Laws. That is an unusual provision from the

early history of the country. To attribute that kind of meanness I think it's mean to say to a people as a ward, as my child that you can't do this if you do it it's void because you're not competent to do it, but if you do it, and some did, and in his discretion feels like prosecuting the person with whom you've dealt, he may do so. As far as you are concerned, buddy, you are out in the cold, somebody else is on your land, you can't bring an action to eject them, you can't get any damages, you've just lost your land. I am not going to attribute to the Congress in what most cases probably have been called speaking with forked tongue. Maybe as the County claimed that is what the Congress intended. If they did, I think it will be more appropriate, more becoming for some Court higher in the hierarchy of the Courts of this one to so declare. As I indicated in the course of the argument, I don't think that the Defendants' intentions are sustained by the history of the Act, sparce though it is. During that period and during the periods of the earlier treaties and subsequent treaties, though glowing statements of protecting the possession in very picturesque language indefinitely, there were statements of the protection that would be afforded the Indian. In the history of the litigation itself, to go back into the legislative history, as I indicated in the Act transferring civil jurisdiction to the State of New York but reserving claims such as this to the Federal jurisdiction, the statement of Congressman Morris I think indicates that it was intended that the Indians have a claim. I think that the fact that statutes of limitations in recent years were enacted to apply to such claims indicate that such claims did exist. You don't apply a statute of limitations to claims of the air, claims that don't exist, and the history of litigation in the Courts indicate that this right to pass on these questions, the question of title, question of right to possession with its allied questions of damages for interruption or interference with that right have existed a long, long time. Johnson-McIntosh which

was referred to in the course of the argument, a case dealing with the transfer of 1775, I believe decided in 1823, dismissed an ejectment action because the Plaintiff derived title which was held to be invalid under it, that would be prior to the Intercourse Act, even, and subsequent cases, United States against Boylin arising in this Circuit in which ejectment was granted and there are a number of cases where the question of title or the invalidity of title by reason of the Trade and Intercourse Act has been determined by the Courts. So that there is a long history of the Courts having exercised this power and I say "exercised" as contrasted with usurped and in this case I think that the Supreme Court itself in reversing the lower Courts on the question of jurisdiction impliedly indicated that such a claim existed. In the absence of a more complete legislative history at the time of the enactment of the first or second Intercourse Act, I can only believe that Congress, instead of attempting or intending to supply an exclusive remedy by means of the fine and imprisonment, intended to impose an additional remedy of a criminal nature for a violation of the statute, a course which is not unusual in a great many areas, I think if anyone wanted to examine the criminal statutes they could find dozens, probably hundreds of crimes which without specification having corresponding civil claims for damages. It comes to mind, I suppose, the horrible instances of people putting razorblades or partial razorblades in candy that's distributed to kids on Halloween, under appropriate circumstances being introduced to inner-state commerce could constitute violations of the Food and Drug Act, mislabeling if they didn't advise of the presence of the razorblades and there is a penalty of the seizure, there is criminal penalties and whatnot. I am sure that wouldn't take the inference, a cause of action away from the damages that he suffers by reason of ingesting one of those pieces of candy and I think you could go on interminably with examples such as that. On the basis of

the complete record in this case, this case has been pending for more years probably than any case in this District. I find no fault with that. I think part of it has been deliberate, part of it has been based on, at least on my part of the nonsupported hope that it would be disposed of. The time I thought would be in favor of that, expressed such a hope in my 1977 Decision but the time has come now — excuse me, I will go back a second — we have had two abortive attempts at getting an Appellate review of these Decisions with reference to liability and one was aborted by the Defendants, by the withdrawal of the appeal in the Second Circuit; the other was aborted after argument by the discovery by the Second Circuit that the Certificate to Appeal under 1292A was improvidently granted. I think the time has come to get a final Decision which will definitely be appealable and which will resolve a number of the questions that have been raised here and which will be applicable to other cases as well as this one. In view of the lengthy time that's been already used in disposing of this litigation, in view of the cases that have actually decided similar cases, in view of the way I see the legislative history and since I feel that the Supreme Court Decision finding jurisdiction impliedly indicated the disposition that I am making here, I'll deny the motion, if it is a motion. It think it was posed more in the form of requesting an Order to Preclude the fashioning of a remedy by reason of the political question doctrine. I will find that the political question doctrine does not preclude the fashion for remedy here and I also feel that in addition to the reasons I have already cited, as I indicated in the course of the argument, that in view of the backgrouud, legislative history, the history of decided cases over a long period of time, that if the Defendants should be correct that political question doctrine requires dismissal of this case, that it's more appropriate, becoming that it be done by an Appellate Court. I will prepare a short Order. I request Counsel to adjourn to cham-

bers so that in a more informal atmosphere we can discuss fixing a date for trial or any other housekeeping details that are necessary to bring this to a conclusion. We stand adjourned to chambers.

COURT CLERK: The Court stands adjourned to chambers.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

ORDER [OF MAY 18, 1981]

ORDER

The Court having heard the parties on the applicability of the political question doctrine and having dictated its decision on the record and upon all of the proceedings had herein, it is concluded and ordered that the political question doctrine does not preclude the fashioning of a remedy in this case.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 18, 1981

[Transcript of a portion of the trial on damages issues held on September 14, 1981, at the United States Courthouse, Auburn, New York, before the Honorable Edmund Port. The transcript includes a portion of the cross-examination of Dr. Jack Campisi, an expert witness called by the plaintiffs, found at Transcript pages [27-31].]

Cross-Examination.

BY MR. VAN GESTEL:

Q Dr. Campisi, my understanding is that you are an anthropologist by profession?

A That is correct.

Q And you have testified here this morning partly as a historian, and partly as a land surveyor, is that correct?

A No.

Q Do you feel comfortable with your testimony that you have given us this morning, that is, do you feel that there are sufficient backup materials in the records that you have examined to enable you to tell this Court where the boundary lines are?

A Yes.

Q And do you feel comfortable, based on your examination of the records in being able to tell the Court the methods used and applied generally by surveyors in setting forth and laying out the lots?

A Generally, yes.

Q When you were testifying a moment or so ago to the effect that subsequent laying out on the map or plan that is Exhibit 59 relied upon things that were laid out in the earlier survey, are you comfortable with that?

A Yes.

Q And do you feel that that was the method that was used by the surveyors?

MS LOCKLEAR: Objection, your Honor. I think that Dr. Campisi's testimony was to the effect that what the state records showed.

THE COURT: I will let him testify.

THE WITNESS: Would you repeat the question?

BY MR. VAN GESTEL:

Q All I am trying to determine, sir, is whether you feel on your extensive examination of the records, whether in fact the surveyor regularly at that time relied on points in previous surveys as their points of demarcation, if you will, for a subsequent survey.

A As far as I could tell from the field books, yes.

Q And in particular, on Exhibit 59, as I understand it, that shows layouts, and the transaction that occurred in 1795, is that right?

A Correct.

Q And layouts of the transactions that occurred in 1798, is that correct?

A Yes.

Q And layouts of the transactions that occurred in 1802?

A Yes.

Q And other subsequent transactions? And it shows lot numbers that were laid out by the Surveyor General, is that not correct?

A I think that is true in all cases except the Peter patent.

Q You know the 1795 survey, which I think is more easily shown on Plaintiffs' Exhibit 58, there is an area that runs sort of north-south, almost a square area, and up in the upper corner is a lot number. Can you tell me what that lot number is?

A I don't have a copy of that.

Q Sorry (offering to witness).

A This one here (indicating)?

Q Yes.

A I can't read it.

Q You are unable to read that copy?

A Well, I can't.

Q Where is the original of that?

A It looks like maybe 54. Is it 54?

Q Does it appear to be lot 54 to you?

A Well —

Q Let me show you something else, then. On Exhibit 57, which is a little more clear, that same lot appears, and what is that last number in the upper northeast corner?

A That is number 54.

Q And down in that same area, Dr. Campisi, in what I suppose is the southeast corner there is a lot number, and what is that?

A 59.

Q And am I correct in understanding that your surveyor relied upon such indicia as lot 54, and lot 59 to do subsequent surveys, or subsequent transactions?

A As far as from what I understand, what they relied on was the boundaries of the external — the external boundaries of the treaty, and whether internally, I don't know what they did.

Q And in the course of your examination of lot — Exhibit 59, for example, have you looked at the several treaties that are represented on that to see if they are accurately described?

A No.

Q You didn't look at the treaty of 1798 to see the point of beginning, if it was lot 54?

A No.

Q And if you look at the 1798 treaty to see if it made reference to lot 59 —

A 1798?

Q Yes.

A No.

Q What is it that enables you to testify here this morning that the various layouts are accurate, on Exhibit 59?

MS. LOCKLEAR: Objection, your Honor. I don't think that Dr. Campisi testified as to accuracy. I think that he testified as to what the state records show.

THE COURT: He may answer. I assume that he considers them accurate because of the places that he found the references to, is that right?

THE WITNESS: That is exactly it.

THE COURT: I don't think that we need that question. I think that it is apparent.

[Transcript of a portion of the trial on damages issues held on September 14, 1981, at the United States Courthouse, Auburn, New York, before the Honorable Edmund Port. The transcript includes a portion of the direct examination of John E. Roberts, a cartographer employed in the Division of Survey, Bureau of Land Management, United States Department of Interior, an expert witness called by the plaintiff, found at transcript pages [41-47].]

Q What is generally considered by cartographers to be the most accurate method of producing a map?

A If there is survey information available, that is the most preferable because it can be the most precisely plotted on the map.

Q Any other methods that are available that can be used?

A In reference to Indian treaties many of them were written before there was detailed information of the country, and they describe a line that goes from a certain river crossing to a certain mountain peak, and along a range of hills, and some such descriptions as that. And it requires considerable judgment in — on the cartographer's part in laying out the lines described in the treaty.

Whereas if there is survey information the lines can be plotted precisely on the map.

Q Mr. Roberts, did your office prepare a map in connection with a case known as Oneida Indian Nation of New York and Oneida Indian Nation of Wisconsin versus United States, Docket 301?

A Yes, they did. I did not personally prepare that map, but my predecessors did.

Q Who was that?

A Several different people were involved in it, but the main one that drew that map up and did the main work on it was Mr. Ernest S-C-H-M-I-D-T.

Q Mr. Roberts, I show you a copy of what was introduced in the liability trial as Exhibit 7. I think I will spread it out here because we won't be using it for a long while.

THE COURT: Would it be helpful to use the side of the jury box to put that map up?

MS. LOCKLEAR: May we enter a stipulation in the record that this document is a copy of Exhibit 7 as introduced in the liability trial?

MR. VAN GESTEL: Your Honor, subject to seeing the original exhibit, it appears to me to be a copy, and I accept Miss Locklear's representation. There appears to be some letters on there that I may not have seen before, but they may not be significant.

THE COURT: All right. I will receive it subject to any proof of any inaccuracy, later.

MR. VAN GESTEL: And I will assume the burden of bringing that to your attention, if any, your Honor.

THE COURT: All right.

BY MS. LOCKLEAR:

Q Do you recognize this document, Mr. Roberts?

A Yes, I do. That is a copy of Docket 301 map prepared by my office.

Q Have you seen a copy of that at your office?

A Yes, I have. We have the original, plus photographs negatives of that.

THE COURT: That is Docket 301 map, and is that how you referred to it?

THE WITNESS: That is the brief reference to it.

THE COURT: Can it be stipulated that the Docket 301 map referred to by the witness is the same as Exhibit 7, and that is the same map — it is a copy of the map introduced as Exhibit 7?

MR. VAN GESTEL: Again, with the caveat of comparisons. It appears to be a copy of the same map, and again, as I look at 59 from here, and I cannot see it all that well at this distance, there appears to be numbers that vary slightly on it, that may or may not be submitted.

THE COURT: All right.

BY MS. LOCKLEAR:

Q Mr. Roberts, could you tell us, would you read from the Docket 301 map itself, what the map purports to represent?

A Well, the title is the Oneida Nation versus United States, and Docket Number 301, Claims 3 through 8. Oneida Reservation, New York, 26 Indian Claims Commission, 138, 1971.

Q Does that document separately demarcate those lands that were the subject of the 1795 cession between the Oneidas and New York State?

MR. VAN GESTEL: Objection.

THE WITNESS: Yes.

MS. LOCKLEAR: I will rephrase the question, your Honor.

THE COURT: All right, rephrase it.

BY MS. LOCKLEAR:

Q Does the caption on the document state that it separately demarcates the boundaries of those lands that were the subject of the 1795 transaction between the Oneida and the State of New York?

A Yes, in the legend it states the treaty dates and the boundaries that are depicted on the map, and among those are the tracts of the September 15th, 1795 treaty.

Q And how are those tracts marked on this document?

A They are tracts 1 and 2, the numbers 1 and 2 depicted on the map.

Q Okay. Mr. Roberts, I show you what has been introduced as Plaintiffs' Exhibit Number 56 (offering to witness). Can you identify that document?

A This is the survey or General's Field Book, Book 27, Oneida Reservation, Pages 3 to 13.

Q What is that document, Mr. Roberts?

A It is a copy of the field notes kept by the surveyor in the 1797 survey of a portion of the 1795 treaty.

Q Have you seen that document before?

A Yes, I have.

Q And where did you see it?

A It was provided to me by your office, and I examined it in my office.

Q Mr. Roberts, I show you a copy of Plaintiffs' Exhibit marked 57. Have you seen that document before?

A Yes, I have.

Q What is it?

A The title of it is "A Map of the Lake Oneida Reservations Surveyed in 1796, Surveyor General Maps Number 227."

The title on that map says, "A Map of the Lake Oneida Reservation Surveyed in 1796 by H.P. Schuyler."

It is approved by the Surveyor General.

Q Have you seen that document before?

A Yes, I have.

Q And where did you see it?

A I also saw this in my office as provided by yourself.

Q Mr. Roberts, I show you Plaintiffs' Exhibit marked Number 58, and can you identify that (offering to witness)?

A This is a certified copy of Surveyor General Map Number 898, a map of the Oneida Reservation.

Q Have you seen that document before?

A Yes, I have.

Q And where did you see it?

A Similarly in my office, as provided by your office.

Q And finally, Mr. Roberts, have you seen this document which is marked for introduction in evidence as Exhibit Number 59, Plaintiffs' Number 59?

A Yes, I have.

Q And what is that?

A That is a certified copy of Surveyor General Map Number 206, untitled.

Q Where have you seen it before?

A Similarly, in my office as provided by yours.

Q Mr. Roberts, did you undertake any steps to make a comparison of the exhibits we just referred to, Numbers 56 through 59, with the Docket 301 map?

A Yes, I did.

Q What did that comparison consist of? Will you describe the steps?

A Generally, I just observed the various maps, visually, to perceive how well they agreed with the depiction on the Docket 301 map, and it was immediately apparent that —

MR. VAN GESTEL: I object.

THE COURT: Well, he is telling us what he saw. All right, go ahead.

THE WITNESS: It appears or appeared to me that —

BY MS. LOCKLEAR:

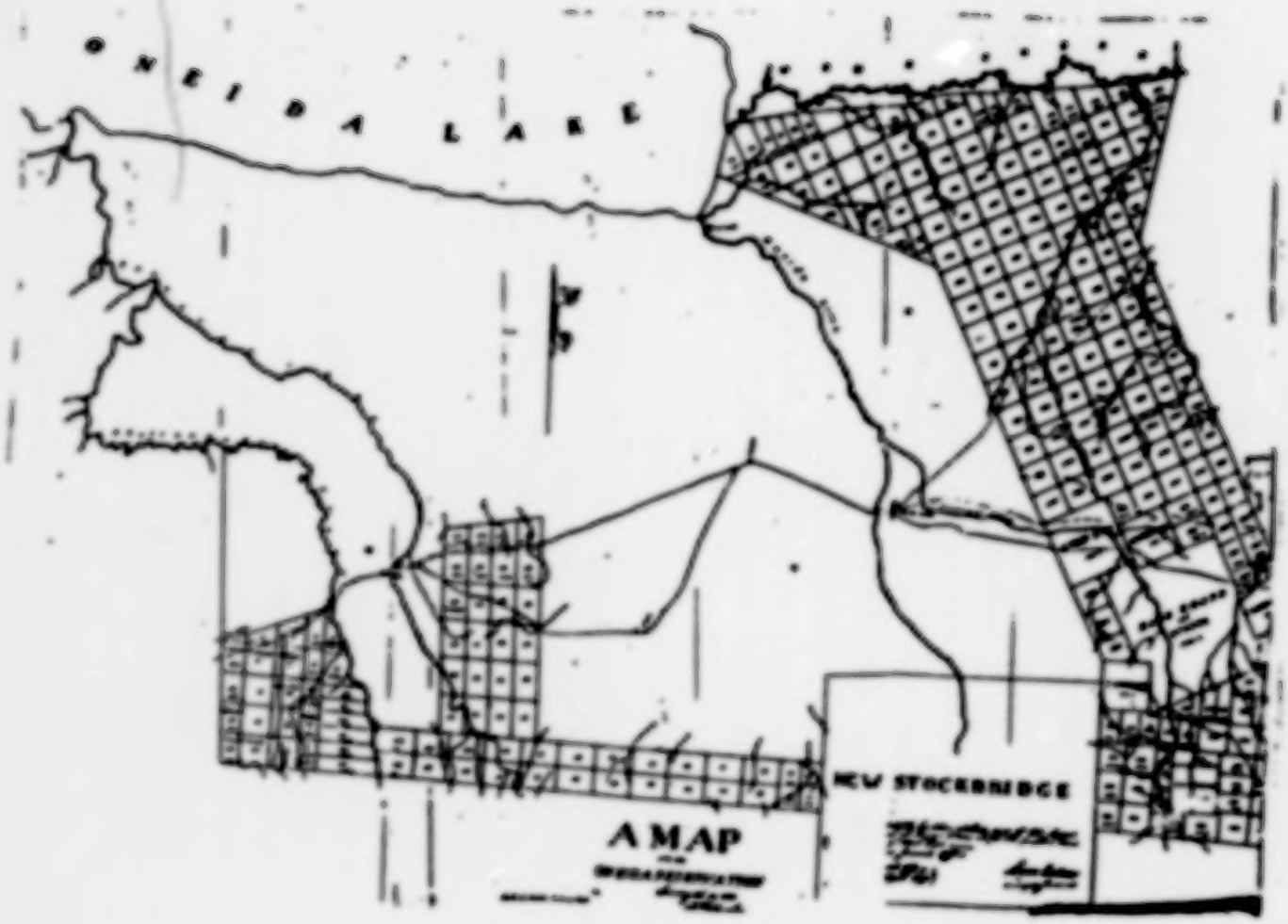
Q What did you conclude from your visual observation or comparison of these documents?

A That they all portrayed the same general areas, and contained largely the same lines, and that the untitled map was the most similar to the Docket 301 map.

Q Were there any particular characteristics that you based those conclusions on?

A Largely the shoreline of Oneida Lake and the streams depicted throughout the map appeared to be quite similar to the ones on the Docket 301 map. I then proceeded to compare a reduced copy of the Docket 301 map, with the certified copy of the untitled compilation of survey map on a cargo reflecting projector.

. . . . . .



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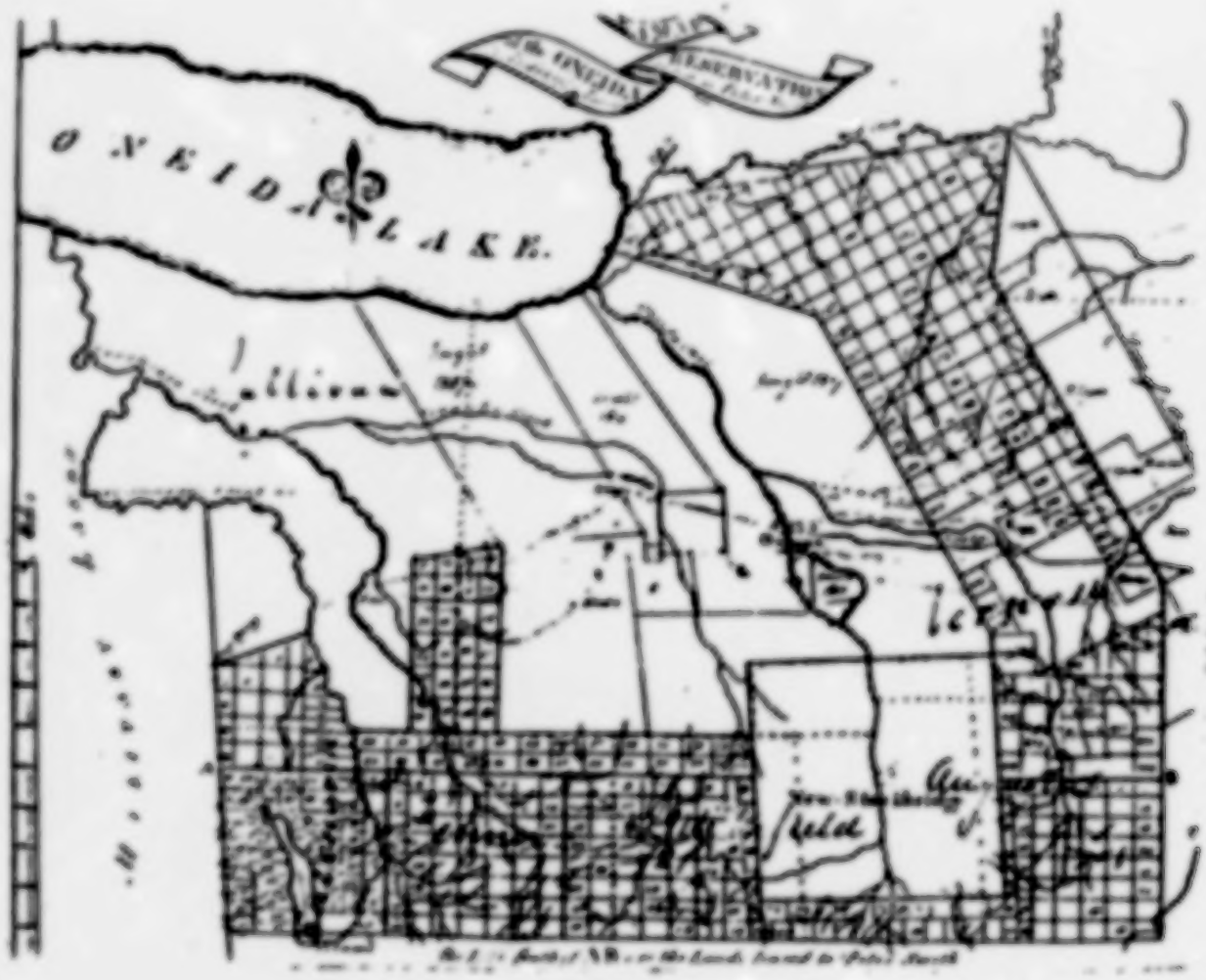

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs,	
v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs	
v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

NOTICE OF MOTION TO DISMISS OF DEFENDANTS COUNTY OF MADISON AND COUNTY OF ONEIDA [OF SEPTEMBER 25, 1981]

TO: Arlinda F. Locklear
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20240

Attorney General
State of New York
Albany, New York
12224

Bertram Hirsch
76-17 250 Street
Bellerose, New York 11426

SIRS and MADAM:

PLEASE TAKE NOTICE that upon the memoranda filed herewith, and all other papers and proceedings had herein, the defendants County of Madison and County of Oneida will move this Court, at the United States Courthouse, Auburn, New York, on Monday, October 5, 1981, at 10:00 a.m., or as soon thereafter as counsel can be heard, for the entry of judgment dismissing this case for the following reasons:

1. The 1795 New York State Treaty was validated by the Treaty of June 1, 1796, and the Treaty of June 4, 1802 (which two Treaties had the requisite federal participation and approval) insofar as:

A. the latter Treaties constituted plain and unambiguous ratification of the 1795 cession under *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941);
B. the 1796 and 1802 Treaties ratified the 1795 Treaty under the standard established in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912 (1965);
C. the federal approval of the 1795 cession embodied in the 1796 and 1802 Treaties and in the Congressional

action on the latter two Treaties constitutes incorporation by reference of the 1795 Treaty into federal law; and

D. the approval of the 1795 Treaty embodied in the 1798 and 1802 Treaties and in the Congressional action on the latter two Treaties constitutes termination of the reservation status of all land within the 1795 cession boundaries under *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

II. The federal common law presumption of a "lost grant" to the land in issue negates any liability on the part of the defendant counties.

III. The 1788 New York Treaty, as confirmed by the 1794 Treaty of Canandaigua, provides prospective federal approval for the 1795 New York Treaty and therefore there is no liability on the part of the defendant counties.

IV. The 1794 Treaty of Canandaigua, in Article VII, provides the sole remedy for the Oneida Nation in the face of the actions of the counties of Madison and Oneida with regard to the land in question, which remedy is a political remedy specifically granted thereby to the President of the United States.

V. This action presents solely nonjusticiable political questions mandating dismissal of the action in its entirety.

VI. The plaintiffs have not proved themselves to be anything other than successors in interest to the Oneida Nation. In the absence of a specific federally approved transfer of the interests of the Oneida Nation in the land in issue to the plaintiffs, they are not entitled to any relief.

COUNTY OF MADISON and
COUNTY OF ONEIDA
By their attorneys,
/s/ Allan van Gestel

Allan van Gestel
Tobin N. Harvey
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs,	v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs	v.	
THE STATE OF NEW YORK, Third-Party Defendant.		

PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW [OF OCTOBER 5, 1981]

1. Parcels 1 and 2 of Exhibit 7* in the liability trial accurately depict the location of the metes and bounds description in Exhibit 6, the 1795 treaty. The land claimed by the defendant counties within said parcels is subject to this action.
2. Exhibit 60 is an accurate transposition of Parcels 1 and 2 on said Exhibit 7 onto a U.S.G.S. base map.

* A copy of Exhibit 7 is attached to defendants' Reply Memorandum on the Issue of Remedies.

Madison County Lands

3. During 1968 and 1969 Madison County claims title to and was in possession of the Champlain Battleground Park, which contains 47.22 acres and is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
4. The highest and best use of Champlain Battleground Park was a park consistent with its present use.
5. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of Champlain Battleground Park during 1968-69.
6. The fair market value of the park during 1968-1969 was $10,600.
7. Madison County claims title to, and during 1968 and 1969 was in possession of a 2.07 acre parcel, which is one of the highest points in the surrounding area. It was used by Madison County as a fire department radio tower, and is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
8. The highest and best use of the Madison County radio tower was as a site for radio-transmission-receiving purposes in a manner similar to its present use.
9. The fair market value of the Madison County radio tower tract as of 1968-1969 was $1,750.
10. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of the radio tower tract during 1968-69.
11. Madison County claims title to, and during 1968 and 1969 was in possession of approximately 63.17 miles of property used as highways located within the exterior boundaries of Parcels 1 and 2 of Exhibit 7.

12. The highest and best use of the subject land used by Madison County as highways depends on the highest and best use of the adjoining land from which it was carved. As of 1968-1969 these uses were agricultural, residential and commercial.
13. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of the 63.17 miles of subject highways during 1968-69.

Oneida County Lands

14. Oneida County claims title to, and during 1968 and 1969 was in possession of a 13.128 acre gravel bed that is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
15. The Oneida County gravel bed is unimproved but has some remaining potential for excavation of gravel and other fill material.
16. The highest and best use of the Oneida County gravel bed was for excavation of gravel, sand and fill material.
17. The fair market value of the Oneida County gravel bed as of 1968-1969 was $7200.
18. Oneida County did not lease out or otherwise receive any ascertainable monetary profits for its use and occupancy of the gravel bed during 1968-69.
19. Oneida County claims title to, and during 1965 and 1969 was in possession of approximately 61.5 miles of land that is improved as highways and that are located within the exterior boundaries of Parcels 1 and 2 of Exhibit 7.

20. The highest and best use of the subject land used by Oneida County as highways depends on the highest and best use of the adjoining land from which they were carved. As of 1968-1969 these uses were agricultural and residential.
21. Oneida County did not lease out or otherwise receive any monetary profit from its use and occupancy of subject highways during 1968-69.

Madison and Oneida Counties

22. The counties of Madison and Oneida, New York, were not in existence in 1795 at the time of the transaction complained of in this action.
23. No evidence has been presented to show that the Counties of Madison and Oneida, New York, acted other than in good faith when they came into possession of the County Land in the claim area subsequent to 1795 and prior to January 1, 1968.
24. None of the improvements which existed on the land claimed by the Counties of Madison and Oneida, New York, in the claim area in 1968 or 1969 existed on that land in 1795.
25. The members of the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band Council were not prevented from using the land which is the subject of this claim during the calendar years 1968 and 1969 in the same manner as the public generally.
26. In connection with the purported sale of land pursuant to the Treaty of 1795, the Oneida Nation received certain compensation from the State of New York.

27. There is no evidence that any of the plaintiffs or their predecessors ever refused or returned any of the payments received for the purported sale of land pursuant to the Treaty of 1795.

PARTIAL CONCLUSIONS OF LAW

1. As this Court determined in its memorandum-decision and order, to the extent the defendant-counties claim title to and possess any part of the lands purportedly ceded by the September 15, 1795 transaction between the Oneidas and New York State, they do so in violation of the Nonintercourse Act. Because the Oneidas' right of occupancy and possession to the land in question was not alienated by the 1795 transaction and has not since been lost, the defendant-counties have illegally claimed title to, used and occupied Oneida land. *Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. 527, 548 (N.D.N.Y.). Therefore, plaintiffs are entitled to a remedy for the counties' illegal use and occupancy of Oneida land.

2. The fashioning of a remedy for violation of the Non-Intercourse Act is a justiciable federal question and, as in formulating a remedy for violation of any federal prohibitory statute, is to be undertaken with reference to the literal language of the statute and the federal policy reflected in the statute. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 173 (1942).

See Heckman v. *United States*, 224 U.S. 413, 438-439 (1912).

> Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged conveyances were void, was a justiciable question; and in

> order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts.

3. The Nonintercourse Act reflects a dual federal policy: first, the statute is intended to protect Indian tribes from overreaching by third parties in the disposition of tribal land by establishing the United States' trust obligation to oversee all such transactions, *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975); second, the statute preserves the United States' sole prerogative to extinguish Indian Title. *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339, 346-48 (1941).

4. The fact that the defendants are political subdivisions of the State of New York is an appropriate consideration in the partial incorporation of state law in the controlling federal law. *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,
Plaintiffs,
v.
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,
Defendants and Third-Party Plaintiffs,
v.
THE STATE OF NEW YORK,
Third-Party Defendant.

NO. 70-CV-35

[TRANSCRIPT OF DECISION OF COURT DICTATED FROM BENCH ON OCTOBER 5, 1981]

DECISION in the above-captioned matter by HONORABLE EDMUND PORT, in the United States Courthouse, Auburn, New York, on October 5th, 1981.

APPEARANCES:
FOR THE PLAINTIFFS: ARLINDA LOCKLEAR, ESQ.
BERTRAM HIRSCH, ESQ.
FRANCIS SKENANDORE, ESQ.
LAWRENCE ASCHENBRENNER, ESQ.
FOR THE DEFENDANTS: ALLAN Van GESTEL, ESQ.
TOBIN M. HARVEY, ESQ.

THE COURT: Miss Locklear, gentlemen, as I indicated at the close of the evidence, I intended, if it was possible, to hear your arguments and to render my Decision on the record following that. I see no reason why that should not be followed.

I have had an opportunity, of course, since the trial to examine the exhibits, to review my notes, where I felt it was necessary, and to review the memoranda that were submitted. I want to thank Counsel for the thoroughness with which this case was prepared and presented to the Court. It was very helpful to me. In fact, speaking of thoroughness, the thoroughness reached the point of reminding me of the tactic which, without meaning to be disrespectful to any Court, I can't say that I wasn't guilty of using when I was practicing law, and, that is, throw anything at the old fool. You don't know what he will pick up if he wants to hold your way.

Some of the arguments, at least to my simple mind, were pretty far out; but I understand the importance of the case and I understand the necessity of making a record that includes every possible or potential argument that can be advocated in favor of either of the parties.

What I am about to place on the record will constitute the findings of fact and conclusions of law, and, of course, what's put on the record now is supplemented by my previous Decisions, all along the line, and by some prepared, written findings of fact and conclusions which I will file with the Court. Those findings and conclusions were largely, if not wholly, derived from the suggested findings of fact and conclusions submitted by Counsel. When I say they were "derived", rather, I culled with various modifications from those suggested findings and conclusions.

Now, throughout my discussion I'll probably refer to the Oneida case. If I do, it encompases the Supreme Court Decision in the case, various Court of Appeals Decisions, and my previous Decisions as they are applicable to the particular cir-

cumstances embodied in reference. I think that I ought to probably make a caveat in view of some of the arguments that have been made that I will use the words "ceded" and "conveyance" and words of similar import with reference to the effect and purpose of the 1795 Treaty and by doing so I in no way intend to leave an inference that I'm, by the use of that language, legitimatizing or validating the purported transfers that were made by that instrument and which I held to be invalid and of no effect.

For our purpose at the present time, I think we can treat the trial as having been bifurcated. The first part decided in 1977 by me determined the issue of liabiity in favor of the plaintiffs and against the defendants. I may state in relation to that, that I thought I made it pretty clear that the plaintiffs had standing and were the proper parties to institute the action. I'm repeating it because the argument was again raised. The trial that occupied a few days recently related to the specific amount of damages, if any, to which the plaintiffs are entitled. Ordinarily, the determination of the amount of damages awarded is regarded as the most important part of a case. Counsel generally look to the last line of the Decision to see how many dollars are involved. In this particular instance, I don't think that's the case. I feel in this case, and I have expressed the feeling before, that the determination that was made in 1977 by me, that the defendants were liable to the plaintiffs, was of much greater importance in the context of the entire problem than the number of dollars that happened to be awarded.

A brief review of the efforts to obtain a definitive Appellate Court ruling before the damage trial might be well at this time.

In 1977, in my Decision holding the defendants liable to the plaintiffs, because the plaintiffs, I found, were occupying the particular subject land in violation of the Non-Intercourse Act, I made certification required under 28 USC Section 1292(b),

that would permit an appeal from that Decision. Reference is made to the Oneida case at 434 F.Supp. 527 at Page 548. The appeal from that particular determination was aborted when the parties stipulated to withdraw the appeal. Considerable time elapsed during which hopefully, I think, I -- I can't speak for anyone else -- thought that it might be possible that some disposition, other than a court disposition, could be made of the issues involved here.

However, that was a hope that remained unfulfilled.

Recently, there was a motion made for a summary judgment based on the determination of the Oneidas' claim before the Indian Claims Commission and in the Court of Claims. In ruling on that motion, which I denied, I again granted the certification to appeal from that Interlocutory Judgment. An application was promptly made to the Court of Appeals for the necessary certification for leave to appeal and it was granted. Unfortunately, from my viewpoint, after the appeal was perfected and argued in the Court of Appeals of this Circuit, that Court dismissed the appeal as improvidently granted so that another opportunity to get a definitive Appellate Court Decision on what I considered to be the important phase of the case, that is, the liability, was missed. I apparently don't give up as readily as I should and still, having that same viewpoint paramount in my mind, urged the parties to attempt to stipulate for the purposes of this trial, only, the amount of damages so that an appeal could go forward promptly.

That suggestion proved impractical. After that, the parties engaged in lengthy preparation for this trial phase, or this damage phase of the trial. That preparation included extensive and extended discovery, including the Freedom of Information Act suit, and an appeal, *County of Madison* vs. *The United States Department of Justice*, 641 F.2d 1036, First Circuit 1981. So that ultimately we have reached this trial of the damage issue which was, which occupied much more time

than I think it should have, and I think I'm responsible for that by reason of the liberality with which I received evidence and ruled on the reception of that evidence. But this case was of sufficient importance so that an appeal should, in my mind, be on the most complete kind of a record.

Some place earlier in this proceeding, I commended the plaintiffs for the manner in which they sought to have this problem resolved. I repeat that commendation. The plaintiffs here have sought to have their rights to the land ceded in the 1795 Treaty determined in the least disruptive fashion to the present owners and occupants of it. They brought this present action in 1970 and some time later, I think, or maybe earlier, designated it as a test case, and rather than seeking ejectment or damages for the almost two centuries of alleged illegal occupancy, they sorted the defendants out, selected the two counties, and sued only for the damages for the use and occupancy of the county lands during 1968-69. This is in sharp contrast to the methods employed in other similar situations, for instance, I had the Mohawk case.

In that case, they applied self-help. The Mohawks merely went up in the Adirondacks, took over a piece of land that they claimed was within their aboriginal land, and seized it and held it by force. That situation is described in *New York* vs. *White*, 528 F.2d 336, Second Circuit 1975. At the same time, New York State instituted an action in this court, various property owners instituted actions in State Courts which resulted in a compromise being reached between the Mohawks and the State of New York, I think, by which some land up in northern New York was transferred to the Mohawks along with various other stipulations, but it was resolved and not in a court; although I'm sure that the State Court's determination and this Court's determination had something to do with the compromise that was ultimately reached.

The plaintiffs make claim in their memorandum in support of the proposed Order and the measure of damages at Page 2 the limited nature of the relief being sought. On Page 2 of that memorandum they state, "The Oneidas do not seek to expand the relief sought beyond the original test case". In their Complaint, the Oneidas sought damages for the counties' illegal use and occupancy of Oneida land during 1968 and 1969.

At the damages trial, the Oneidas intend to offer proof of their proposed measure of damages for the years 1968 and 1969 only. Neither do the Oneidas intend to pursue their right to evict the counties in this action."

So that our issue here was well defined and limited. The specific plots of land occupied by the defendants were not particularized in the trial of the liability issues. The parties, however, stipulated that the parcels occupied by the defendants prior to and in 1968 and 1969 and of which they were and are the record owners and possessors, are part of the land transferred in 1795, that was at Page 6 of the transcript of the liability trial.

Anyone with any experience with litigation knows that it is not unusual for litigants to take extreme positions in furtherance of their respective causes. The parties have done so in this case in relation to the damages. The plaintiffs claim the highest possible amount as damages while the defendants assert damages are non-existent. To me a fair disposition supported by law lies between these extreme positions.

A statement of the law to be applied is not difficult. The parties are in accord that under the Supreme Court Decision in this case the applicable law is the Federal Common Law, "the governing rule of decision would be fashioned by the Federal Court in the mode of the common law." That's from the Oneida case at 414 U.S. at 674. From that point on there's "divergence" of course in the views of the parties. They differed greatly as to how the common law should be fashioned

but they agree, again, that the principal objective in fashioning the applicable law should be "the vindication of Federal preeminence in Indian affairs", Defendants' Reply Memorandum, Page 16.

The parties see the means of vindicating Federal preeminence in quite different ways. The defendants arguing that this can be achieved only "by granting these claimants no relief whatsoever". There is no mistaking the position there. The quote ended with "whatsoever". Defendants' Reply Memorandum on Page 18.

The plaintiffs say vindication requires awarding the highest possible damages as rent computed on the basis of the occupied land with the improvements as they existed in 1968 and 1969. As a fall-back position, the defendants argue that if damages are to be awarded, that the Federal Common Law should be fashioned by the virtual wholesale adoption of New York State law, case law and statutory law both.

In applying that law, the defendants say that any damages sustained by the plaintiffs should be "reduced by the aggregate of the following: (a) The value of all consideration received by the Oneida Nation at the time of the transfer of the subject property in 1795. (b) The value of all subsequent payments received by the Oneida Nation or any of the plaintiffs pursuant to the 1795 transaction, including any annuities received and any capitalized annuity payments made. (c) The value of the use by the plaintiffs themselves including any members of the plaintiff tribal entities of the County lands, roads, and facilities within the claim area during the two-year period at issue." Defendants proposed findings of fact and conclusions of law, page 14.

As was indicated on the oral argument, although I don't think anybody made any computations, that reduction by the aggregate of the items claimed by the defendants would result in a verdict of no damages. As I have indicated the plaintiffs

want a Judgment reflecting the fair market value, the fair rental value, rather, of the lands as of the improved 1968-1969 condition; that is, with the highways built and so forth. And, in addition, damages for "waste or other injuries to the land" with interest at the prevailing rate on prudent investments. Plaintiffs' joint proposed findings of fact and conclusions of law, page 10.

That there was a federal and is a Federal Common Law applicable, I think, is pretty clear. Long before the adoption of our Constitution, the English Common Law recognized an action for damages which is incorporated into our common law, resulting from the unlawful occupation of plaintiffs property. As a matter of fact, I remember, it's over fifty years now so that my recollection is somewhat vague and hazy, but I do remember that in law school in some course, either Real Property or Common Law, I remember the professor talking to us abut a "Trespass Quare Clausum Freight"; that may be what we have here. I am not sure if you have to give it a name, but the principle, however, has been applied in the Federal Courts for ages.

The unlawful use and occupation of land entitles the plaintiffs not only to recover the land but to damages "measured by the reasonable value of the use and occupancy considering its extent and duration", *Utah Power and Light Company* vs. *United States*, 243 U.S. 389-411, 1917. And in dealing with this entire subject, I think it is well to keep in mind what was said in *United States* vs. *Gilbertson, et al.*, 111 F.2d 978-980 (7th Cir., 1940), that "in general statutes passed for the benefit of dependent tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians," citations omitted.

Both parties, as I have indicated, agree that vindication, preservation of the preeminence of the United States in Indian affairs should be the guiding principle behind the fashioning

of a common law remedy. Plaintiffs, of course, have said that in order to fashion appropriate law that their damages should fully compensate them and deprive the defendants of any profits or benefits by reason of their unlawful use of the land.

The defendants say that the only way that this principle of Federal preeminence in Indian affairs can be vindicated, can be achieved, "only by holding that the Oneidas are entitled to no relief whatsoever", Reply Memorandum of defendants on the issue of remedies, pages 16-18.

As I indicated earlier, I find it impossible to accept either of these views.

The defendants also claim that traditionally damages have not been awarded for violations of the Non-Intercourse Act and that violators are not called upon to respond in damages. They also say that by granting them the offsets that they seek would not at all be inconsistent with applicable law or with the vindication of Federal preeminence. They also meet the argument of the plaintiffs that the Counties are bad-faith occupiers by saying that, of course, if New York State was in bad faith, that is one thing; but the sins of the State do not fall on the Counties of the State under these facts.

Their argument, the defendants' argument that damages, again to the claim of lack of implied cause of action. They distinguish the cases that have awarded damages by pointing out that in those cases there were violations of statutes relating to allotments rather than violations of the Non-Intercourse Act. To support that argument, they point out that the allotment cases derive viability from the General Indian Allotment Act of 1887, 25 USC, Section 345. That section is inapposite. All that does is afford District Court jurisdiction over allotment claims. There is no question about the jurisdiction that this Court has. I learned that lesson from the Supreme Court in this case so that nobody can argue jurisdiction here. This Court had jurisdiction and in determining that this Court had

jurisdiction, the Supreme Court, of necessity, found that the Complaint alleged a claim entitling the plaintiffs to relief. That, if not explicit, was certainly implied in the Supreme Court Decision in this case.

The defendants read the Supreme Court Decision as limited to a finding of jurisdiction. But merely assuming, without deciding that a valid claim had been asserted and they quote from *Burks* vs. *Lasker*, 441 U.S. 471, at page 476, Note 5 that the "question whether a cause of action exists is not a question of jurisdiction and, therefore, may be assumed without being decided". The assumption, however, is made on the basis of pleadings alone. There aren't any facts. We have had a trial here. Right or wrong, I've decided that the defendants were liable.

The defendants also argue that many of the cases upon which the plaintiffs rely "do not even award the plaintiff damages or alternatively do so without the benefit of any discussion as to whether there is an appropriate remedy"; Defendants' Reply Memorandum on the issue of damages, page 33.

To my mind it is too late in the day to credit this argument. There are many cases cited in the parties' Briefs and the earlier Opinions in this case that have, in fact, awarded damages. And some of the cases, the more extreme remedy of removal of the illegal occupant has been ordered and in all of the cases the occupant was in a chain of title derived from a conveyance by Indians executed in violation of the statutory restriction on alienation. As a result of which, as it was found in this case, the conveyance was void. For example, *Heckman* vs. *West*, 224 U.S. 413, 1912, *United States* vs. *Boylan*, 265 F.2d 165 and I am sure that you could go on with citations in a string, if you were so inclined.

The defendants in support of their claim that Federal primacy in Indian affairs can only be vindicated by denial of

damages to the plaintiffs present a convoluted thesis. The principle thrust of the argument is a reassertion of the non-justiciability and the lack of implied cause-of-action arguments. These were made earlier. I have ruled adversely to the defendants. Those arguments did not, in my opinion, support a dismissal for failure to state a claim after a trial. They do not support a denial of damages. I think what's been missed here, when you talk about implied causes of action under the Non-Intercourse Act, is that it is not necessary to seek out an implied cause of action. This old common-law action of trespass will do very well. Why be inventive? You're going to invent the wheel all over again. Then defendants go on placing under the rubric of the vindication of Federal preeminence in Indian affairs and presented argument that the Treaties of 1978 and 1802 were offered and received in evidence in the liability trial. There is no argument about that.

But they maintained that those Treaties constitute a ratification of the 1795 conveyance. If I am not mistaken, and I don't think I am, that same argument was presented on more than one occasion earlier as a plain ratification argument. It's now been placed under the requirements for vindication -- it's now been plced under the vindiction argument but it is the same argument dressed up in a new costume. The costume makes it no more effective nor neither does the repetition. That suggests to me -- perhaps I should digress for a minute to just explain that this is a District Court, this is the bottom rung of the hierarchy of the Federal Judicial System. The District Court has not and none other than the Supreme Court has the luxury of refashioning what appears to be existing law by reason of contemporary times or conditions. That luxury resides solely in the Supreme Court of the United States. And in saying that, I recognize that it's necessary to make the arguments here to avail one's self of them in the higher courts. So that while if I appear a little edgy about repetition, it's with a recognition of the necessity for making the arguments here but this argument about the 1795 and 18 -- 1794, 1795, 1802 Treaties are really nothing more than what country lawyers would refer to as incorporation by reference in a Deed. It boils down to the claim that reference in a Deed to a metes and bounds description of the boundry line used in a previous conveyance constitutes a ratification of the validity of the earlier conveyance. It just doesn't add up. All the elements necessary for ratification, I find, are missing.

Further, the matter of ratification is the defense that should have been in, and in fact, was raised in the liability trial. In my Decision in that phase of the case, after finding that the 1795 Treaty was not consented to by the United States, I said, "No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The Federal consent required by the Non-Intercourse Act was not obtained before or after the fact", 434 F.Supp. at 538. Nothing has been changed and nothing has been brought to my attention up to this point to change that statement.

The plaintiffs' view of the damages to which they are entitled requires that rent be computed for the subject land with the improvements existing on it from 1968 and 1969, and with all of the profits that would be derived from those improvements; if there were a skyscraper on it, the rent being paid by the tenants, the actual tenants of the space would be part of the damages to which the plaintiffs would be entitled.

The defendants, as I indicated earlier in summing up their arguments, say that any damages that are given to the plaintiffs must have from that sum deducted these other monies they have received and so forth and including the use by the plaintiffs and their members of the roads and other public facilities. In other words, most of us could use these county roads in Madison and Cayuga County without paying anything. As far as the Indians are concerned, they become a toll road; that is about the effect of it.

I think somebody smiled when they threw that one at me. Of course, that position is neither supported by the law or the facts and just on the face of it, it would seem terribly inequitable to deduct the amount that the plaintiffs received for land illegally used by interlopers for almost two hundred years against an award covering approximately one percent of that time. I indicated that I could not adopt either claim as to damages. This is a case, probably, that the Court will have to rely on Gilbert and Sullivan for precedence and "let the punishment fit the crime."

I recognize that plaintiff's argument to vindicate and to give the tribe damages as to means of vindicating the federal supremacy is not treated, at least by them, as a penalty. But it seems to me that the policy of the Non-Intercourse Act in the light of the facts and the claim made here can be done with far less draconian methods.

The plaintiffs argue at some length and with some sincerity, I am sure, that the entitlement to these large damages that they have claimed arise out of the bad faith of the defendants. I recognize that good faith is not a defense to a common-law action for damages for unlawful use and occupancy of land. However, even under the oldest cases a good-faith occupier was permitted to offset the value of the improvements against the damages, *Green* vs. *Biddle*, 21 U.S. 1, 1823. Plaintiffs say that the State of New York not being an occupant in good faith, and the defendants don't feel it is necessary to defend the State of New York at least on this argument, just say that, that unlike the plaintiffs who claim that the defendant counties, the successors in the chain of title to the State of New York, stand in their shoes.

The defendants say that isn't so. There is no bad faith, and that they don't succeed to the bad faith in the State of New York.

I am inclined to agree with the defendants insofar as the right to occupancy is concerned and no matter what, I don't think it's necessary to treat the counties as bad-faith occupiers for the purpose of assessing and fixing damages. The bad faith consisted of the violation of the Non-Intercourse Act by the State of New York. Counsel have referred to the knowledge on the part of the State of New York of the requirements of the Non-Intercourse Act and the liability trial had much historical data to support that law.

However, there is no evidence to connect the defendants, these two counties, with that act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1988 or 1989 and, of course, we are not concerned in this case with any other time. As a matter of fact, there is no evidence as to when or how the counties acquired this land. The Wooden Ware case that was referred to by the Counsel as supporting their view, I think is distinguishable on the facts, as I think I pointed out during the argument. In that case, the good-faith purchaser was merely being held in damages for the increment that he received at the hands of the trespasser or the culprit. He wasn't, and the Court didn't fix, liability on him for improvements that he put in, if any, that he put into the wood that he acquired, the timber that he acquired from the trespasser. And while the Supreme Court Decision doesn't show what happened with the particular timber, I don't think you have to have much of an imagination to think that by the time the case reached the courts that it was in some condition other than the posts or logs or whatever that he bought from the Indian trespasser.

The *Russian American Packing Co.* vs. *United States* case, 199 U.S. 570, relied on by the plaintiffs is also inapplicable. In that case the plaintiff seeking recovery with the value of improvements it made on the land was not an occupier in good faith. It "was a mere trespasser in occupying the land witho..t

a shadow of title", 199 U.S. 579. I think the courts have established that in Indian allottee, or tribe seeking to cancel or to declare a conveyance made in violation of the Non-Intercourse Act void, is not required to return the consideration received as a prerequisite to maintaining the action. But as clear as that rule appears to be, even that apparently is not absolute. Even in such a case the Court has not ruled out the possibility that under some circumstances a return of the consideration might be required, *Heckman*, 224 U.S. 447.

And in other cases the Courts have indicated that they are not adverse to ameliorating the harshness of the offset rule under appropriate circumstances if the principle, of Federal supremacy is not disturbed and is equitable. In *United States* v. *Brewer*, 184 F.Supp. 377, District of New Mexico, 1960, although the Court entered an Order of Eviction against the unlawful occupants of Indian land who had erected improvements on it, I think to the extent of some $9,000 which was apparently regarded as substantial in the case, the Court stayed the eviction for six months and also permitted defendants to take as much of the improvements and building materials as they were able to. In *United States* vs. *Forness*, 125 F.2d 928, a case arising in this Circuit in 1942 to which reference was made in my liability Decision, the Court there granted a cancellation of a lease with the Seneca Nation of Indians.

In some facets, this case is reminiscent of that one. That case involved a four-dollar lease but there were hundreds of others. This case involves a relatively small piece of land within a much larger area. In any event, the Court, while entertaining a Decree cancelling the lease because it violated an alienation disqualification, required that the Senecas keep open an offer to lease under different terms for a period of sixty days.

Now, that offer to lease had been earlier made by the Senecas in my mind denying the request to fix the rental on the

basis of the existing proof, that is, highways run into millions of dollars and denying that request is equitable and does not do violence to the principle of Federal supremacy.

In getting down to evaluating the dollar worth of the unlawful use and occupancy of this land for two years, a difficult problem is presented. Of course, it is unique in that it is Indian land and it is unique also in the very differing degrees in which the parties see the damages. The usual case fixing rental isn't a terribly tough chore; experts come in; the building across the street was rented for a certain amount, the building next door was rented for a certain amount during the period; and you get pretty good guidance. But here we are dealing with a much more difficult factual situation but that doesn't mean it can't be done, that it isn't a question that can't be handled. Courts every day put dollar signs on, I think, much greater imponderables. They put a dollar sign on the pain that a plaintiff suffers, pain that nobody else in the world can feel. The Courts that are able to do that, I think, can fix damages with some degree of reasonableness and equity in a case such as this.

I mention that in passing because the argument has been made that this was a matter not only inappropriate for Courts to handle but which Courts were unable to handle. Searching around for a basis upon which to fix damages. This is not an eminent domain case, obviously. Eminent domain, the State or government would be taking the land lawfully and they would be required only to pay due compensation, assuming, of course, the other elements of the taking are met.

Here the taking was unlawful but it still boils down to this: That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent

domain could be applied here and do justice to the parties. This is by reason of the delicacy or consideration with which the plaintiffs brought on this action with only -- we are only dealing with what amounts to a two-year occupancy or an easement for two years so that that is the view that I would be obliged to take. I can't say that I wasn't confused by some of the evidence concerning the damages and the value. A good deal of it took on the aspects of how many angels can dance on the point of a pin, as far as I am concerned. In fact, one of the witnesses I think aptly described some of the assumptions as "fantasy".

I would endorse that viewpoint. In fact, under the defendants' testimony it was like listening to the story of Rip Van Winkle. Somebody went to sleep in 1795 and woke up it 1968. Maybe I will be Rip Van Winkle when the Supreme Court gets through with this case, I don't know.

In any event, the evidence that I received from the defendants as to the value I gave no weight, practically no weight at all. The approach that I think was fairly presented and from which damages can be determined was the approach used by plaintiffs' experts in what they described as "across the fence value". That is, they looked at the land, not as the defendants' witnesses did, as it existed in 1795, but the plaintiffs looked at it as it existed in 1968-1969. What you find then are a park, gravel pit, a radio tower, roads running through a county. But now would you evaluate these smaller parcels there seems to be little or no dispute about except when we get down to the defendants' blanket evaluation of three or four dollars a year per acre? That was it, and the defendants, of course, --then I am not sure at one time the defendants' expert viewed the entire countryside as it existed in 1795.

In another part of his testimony, I got the impression that he viewed the county lands, envisioned them in 1795 and the surrounding areas in 1968-69. There were two time periods. We

got a dense, some kind of a forest or wilderness running where these roads are, farms, cities, urban communities, what-not on either side. That I think the witness himself called "fantasy".

The approach that was appealing was the approach of the plaintiffs that determined the value of this road and the other properties on the basis of the conditions as they existed; that is, part of this highway, I'm sure, was much more valuable, or I should say, more valuable than other parts and he divided the areas up and alloted to each particular area an evaluation.

He found that the Madison County-Champlain Park consisted of forty-seven acres at $225 an acre and the total value, market value of $10,080. The only evidence -- I don't think there was any evidence; if there was, it came under the catch-all of $30.00 an acre for the defendants' view which I didn't adopt. The rental was fixed at five percent of the value or $530. That figure I accept.

The radio tower, a small item of virtually two acres, was computed to have a fair market value of $1,750 by the plaintiffs' expert and $60.00 by the defendants'. I think that the plaintiffs' expert demonstrated a much sounder base and impressed me as not exaggerating the value of the property and I accept his valuation. He computed the rent at ten percent of that or $175 and that is accepted.

The Madison County roads he found needed three different classifications. He found that there was about 322 acres which would be classified as the highest and best use for agricultural or recreational land and he valued that at $125 an acre. He found fifty-four acres having the highest and best use of residential and three acres having the highest and best use for commercial purposes. These were evaluated at $750 an acre for residential and $1,400 an acre for commercial land, making the total fair market value of $85,000.

The defendants applied, as they did to everything, thirty to forty dollars an acre which I gave no weight. I considered it but I don't think it was deserving of weight based on the supporting basis upon which the valuations were made. All of the experts did agree, however, that in fixing the value of a rental or easement in this area that the uniformly-acceptable standard was to fix it by taking the market value, fair market value, multiplying it by ninety percent and then multiplying by five percent, and that is, five percent of ninety percent of the value, fair market value. Computed on that basis, the $85,000 fair market value for the rental or value of the easement for the two years would be $3,825.

The smaller parcels, the Champlain Park and radio tower, were found to have the highest and best use in accordance with their present use. Under these computations, the plaintiff during the two years has been damages by the unlawful occupancy by Madison County to the extent of $9,000. With reference to Oneida County, the defendants' expert made no appraisal at all, if I recall. If there was an appraisal, it would come under his catch-all thirty-five dollars-an-acre which I cannot accept for the same reasons that I could not accept the defendants' expert with reference to Madison County lands.

The plaintiff found that there was a gravel pit of thirteen-some acres which had a fair market value of $7,200. This is undisputed and accepted. He fixed the fair market value at $550 per year, which is also accepted. I think, which also is undisputed, the defendants' expert said he made no appraisal of the gravel pit.

With reference to the roads, an examination of the area through which the roads run places approximately 400 acres in the agricultural and recreational land highest and best use, 30 acres within a residential highest and best use. The agricultural-recreational land was appraised at $125 an acre, the residential land at $750 an acre; making a total valuation of

the unimproved land for the Oneida County roads of $72,000. Applying the formula which all of the experts agreed upon would result in $3,267 per year. The total fair market rental value or damages sustained by reason of the Oneida County's unlawful occupancy of the land comes to $3,817, that's treating the highest and best use for the roads, as I have indicated, and the highest and best use for the gravel pit as a gravel pit, a partially-worked gravel pit.

With reference to damages relating to waste from the gravel pit, I recall no testimony. I don't know that anything was taken from the gravel pit during the years in question so that the total damages sustained by the plaintiffs at the hands of Oneida County for two years is $7,634.

We now come to the question of interest. I had no problem with finding that the plaintiffs are entitled to interest. They were deprived of the use of their land during these two years. That deprivation has a dollar figure. And the interest should be part of their damages. The manner of computing the interest raises a problem. The Intercourse Act, the cases to which I have been referred as far as I was able to see, offer no instruction as to how to compute the interest. In this particular case, barring some absolute requirement, I feel it would not be inappropriate to look to the law of the State of New York for guidance. I have done that and I have incorporated New York law as I feel it is applicable and equitable to the verdict here. The defendants are counties. We all know the rules that the Legislature has provided, rules for the fixing of interest in the case of judgments and claims against counties, against municipalities, under New York General Municipal Law, Section 3(A)2. Interest against municipalities is limited to three percent, except in the cases of condemnation and wrongful death, in which cases it is six percent.

Technically, this is not, as all Counsel seem to agree, well, obviously not a wrongful death and Counsel seem to agree that technically it is not a condemnation suit; however, the rule of

damages in condemnation suits has been referred to, and I think appropriately and I think that the rate of interest to be applied in condemnation suits provides the best guide under the facts of this particular case. The damages here parallel the measure of damages for acquiring temporary easement for road purposes or other purposes. Possession by the municipalities was acquired without the consent of the rightful owner and adapting New York Law of Interest as it relates to claims and Judgments against counties, I think it is appropriate to fix interest at six percent per annum.

There is probably some housekeeping that we should do. There were motions made, or at least one that I can recall, to strike one of the expert's testimony on the value of the appraisal. The motion is denied. As I indicated earlier, this dictation on the record, coupled with some partial findings which I will file with the Clerk, copies of which will be available to Counsel right after the trial, right after my dictation here, together with all of the other Opinions and proceedings in the case constitute the findings of fact and conclusions of law.

I will dictate a very short Order this afternoon directing the Clerk to enter Judgment in favor of the plaintiffs and against the defendant County of Madison in the sum of $9,060 with interest at six percent per annum from January 1, 1968, and a Judgment against the defendant County of Oneida in favor of the plaintiffs in the sum of $7,634 with interest at six percent per annum from January 1, 1968.

Judgment in those sums will be entered forthwith.

Now, can anybody help me, the third party, I haven't thought of looking it up earlier, but the third-party action here has not been disposed of, obviously. Is it necessary for me to make certification of some kind where Judgment is entered against fewer than all of the parties?

MR. Van GESTEL: If your Honor please, Rule 54(b) addresses the situation and it suggests when there are multiple

parties or when there are cross claims or third-party claims in the absence of such a determination by the Court there will be no final Judgment, that is then appealable, so you would have to make a ruling under that particular section.

THE COURT: I will include such a statement in my direction to the Clerk.

MR. Van GESTEL: Your Honor, may I come back to what I had said earlier? However, I think the resolution of the claim over is purely a matter of law and I would like to file a motion and a Brief so it could be heard.

THE COURT: I am not going to hear argument. I think it is time to, as I said before I guess in disposing of one of the motions, time to get this show on the road. That is what we are going to do. This is a Final Judgment from which an appeal can be taken.

Anything further?

MS. LOCKLEAR: No, your Honor.

THE COURT: Well, I don't suppose there is that much urgency. The Clerk will, of course, forward his Judgment card or whatever he does in relation to the entry of Judgment. I want to thank Counsel again.

Stand in recess.

The Clerk will return all the exhibits to the parties who supplied them. The parties can make them available to any Appellate Court. They won't get lost again that way.

COURT CLERK: Court stands in recess.

CONCLUSION OF PROCEEDINGS

* * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs,	•	
v.	•	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs	•	
v.	•	
THE STATE OF NEW YORK, Third-Party Defendant.	•	

ORDER [OF OCTOBER 5, 1981]

The above-entitled action came on for trial before the Court at the United States Courthouse at Auburn, New York on September 14, 15, 16 and 17 and the Court having heard the evidence, and the motion to dismiss at the close of all of the evidence was deferred for argument to October 5, 1981, and the Court having heard and considered the arguments of the parties and having dictated its decision, findings of fact and conclusions of law and having filed additional partial findings of fact and conclusions of law, and upon all of the proceedings heretofore had herein, it is ORDERED:

1. The defendants motion to dismiss be and it hereby is denied;

2. That the Clerk enter judgment in favor of the plaintiffs against the defendant County of Madison in the sum of $9,000, with interest at six per cent per annum from January 1, 1968; and judgment in favor of the plaintiffs against the defendant County of Oneida in the sum of $7,634 with interest at six per cent per annum from January 1, 1968 and

3. That pursuant to the provisions of 54(b) Fed. R. Civ. P. the Court finds and hereby makes an express determination that there is no just reason for delay in the entry of final judgment.

/s/ Edmund Port
Senior U.S. District Judge

Dated: October 5, 1981
Auburn, New York

NOTICE OF JUDGMENT [OF OCTOBER 5, 1981]

CLERK'S OFFICE
United States District Court
FOR THE
Northern District of New York

Oneida Indian Nation of N.Y.,
et al
vs. Civil Action No. 70-CV-35
County of Oneida, et al

There was entered on the docket Oct. 5, 1981 an order & (judgment) in favor of plaintiffs & against County of Oneida in sum of $7,634 & against County of Madison in sum of $9,060 — both w/int. at 6% per annum from 1/1/68. JR. SCULLY, CLERK

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,
v. CIVIL ACTION NO. 70-CV-35

THE COUNTY OF ONEIDA, NEW YORK, et al.,
Defendants.

Notice of Appeal of the Counties of Madison and Oneida, New York.

Pursuant to Fed. R. App. P. Rules 3 and 4, notice is hereby given that the defendants, the Counties of Madison and Oneida, New York, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment of this Court, Port, J., entered in this action on the 5th day of October, 1981, and all adverse interlocutory judgments and orders heretofore entered herein.

Respectfully submitted,

_____

Allan Van Gestel
Tobin N. Harvey
GOODWIN, PROCTER & HOAR,
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: October 28, 1981.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of February one thousand nine hundred and eighty-two.

Present:

HONORABLE WILLIAM H. TIMBERS,
HONORABLE RALPH K. WINTER,
Circuit Judges.

ONEIDA INDIAN NATION OF
NEW YORK, et al.,
Appellees-Cross-Appellants,
v. 81-7786.
THE COUNTY OF ONEIDA,
NEW YORK, et al.,
Appellants-Cross-Appellees.

Appellants-cross-appellees having moved by notice of motion dated December 29, 1981 for a stay of the appeal (1) pending resolution of a claim by the Counties against New York, (2) pending termination of *Oneida Indian Nation* v. *United States*, No. 301 in the Trial Division of the United States Court of Claims, or (3) pending the decision in *Oneida Indian Nation* v. *New York*, Nos. 81-7610, 81-7618, 81-7620, 81-7628, 81-7638, 81-7646; or, in the alternative, a remand to the United States District Court for the Northern District of New York on either grounds (1) or (2) above, it is hereby

ORDERED that the case be remanded to the United States District Court for the Northern District of New York pending resolution of claims by the Counties against New York, and the motion for a stay of the appeal is denied.

/s/_____
WILLIAM H. TIMBERS, U.S.C.J.

_____
RALPH K. WINTER, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and the ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-against-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants and
Third-Party Plaintiffs.

THE COUNTY OF ONEIDA, NEW YORK,
Defendant and
Third-Party Plaintiff,
-against-

STATE OF NEW YORK,
Third-Party
Defendant.

Revised Notice of Motion to Dismiss Third-Party Complaint

THE COUNTY OF MADISON, NEW YORK,
Defendant and
Third-Party Plaintiff,
-against-
STATE OF NEW YORK,
Third-Party Defendant.

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court at a Term thereof for hearing of motions to be held on the 5th day of May, 1982, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States Courthouse at Auburn, New York, for an order pursuant to Rule 13(b)(1), (2) and (6) of the Federal Rules of Civil Practice dismissing the Third Party Complaint against the State of New York for (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, and (6) failure to state a claim upon which relief can be granted.

Dated: Albany, New York
March 2, 1982

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
The Capitol
Albany, New York 12224
Telephone: (518) 474-7173

BY_____
JEREMIAH JOCHNOWITZ
Assistant Solicitor General

TO: ROBERT MC DERMOTT, ESQ.
MADISON COUNTY ATTORNEY
112 Farrier Avenue
Oneida, New York

WILLIAM CALLI, ESQ.
ONEIDA COUNTY ATTORNEY
John Balzano, of Counsel
800 Park Avenue
Utica, New York 13501

GOODWIN, PROCTER & HOAR, ESQS.
Of Counsel to Madison and Oneida
Counties
Attn. Allan van Gestel
28 State Street
Boston, Massachusetts 02109

LAWRENCE A. ASCHENBRENNER
ARLINDA F. LOCKLEAR
Native American Rights Fund
1712 N Street N.W.
Washington, D.C. 20036

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,
v.
CIVIL ACTION NO. 70-CV-35

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,
Defendants and Third-Party Plaintiffs,
v.
THE STATE OF NEW YORK,
Third-Party Defendant.

Notice of Motion for Summary Judgment by the Counties of Oneida and Madison Against the State of New York

TO: Jeremiah Jochnowitz
Assistant Solicitor General
Department of Law
The Capitol
Albany, New York 12224

Arlinda F. Locklear
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036

Bertram E. Hirsch
81-33 258th Street
Floral Park, New York 11004

SIRS and MADAM:

PLEASE TAKE NOTICE that upon the memorandum of law filed herewith, and all other papers and proceedings had herein, the defendant Counties of Oneida and Madison, New York, as third-party plaintiffs will move this Court, at the United States Courthouse, Auburn, New York, on Wednesday, May 5, 1982, at 10:00 a.m., or as soon thereafter as counsel can be heard, for the entry of summary judgment pursuant to Fed. R. Civ. P. Rule 56, against the third-party defendant, The State of New York, on the grounds that there is no genuine issue as to any material fact on which this motion is based and the third-party plaintiffs are entitled to judgment as a matter of law.

Pursuant to Local Rule 10, there is annexed to this Notice of Motion a separate, short and concise statement of the material facts as to which the third-party plaintiffs contend there is no genuine issue to be tried.

Dated: March 5, 1982.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK

By their attorneys,

/s/_____
Allan van Gestel
Frank Dennis Saylor, IV
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Annex to Notice of Motion.

Pursuant to Local Rule 10, the third-party plaintiffs herewith submit their statement of the material facts as to which they contend there is no genuine issue to be tried.

1. The claim made by the plaintiffs in this case ("the Oneida Indians") seeks damages for the use and occupancy during the years 1968 and 1969 for those portions of certain land purchased by the State of New York from the Oneida Indians pursuant to a treaty entered into in 1795. The plaintiffs contend in essence that the transfer of land by the 1795 treaty to the State of New York violated the Trade and Intercourse Act of 1793, claiming that the sale was not made with the consent or approval of the United States.

2. On July 12, 1977, this Court found liability against the Counties. The liability was based on the Court's determination that the facts showed that the 1795 transaction between the Oneida Indians and the State of New York did not have the requisite Federal approval and, therefore, was void as a violation of the Trade and Intercourse Act of 1793. *Oneida Indian Nation of New York v. The County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977). All of the facts found by the Court are incorporated herein by reference for purposes of this motion. It does not seem necessary to set forth the facts found by the Court in affidavit form.

3. On October 5, 1981, this Court entered Partial Findings of Fact and Conclusions of law which included, in Findings 22 and 23, the facts that:

> (a) "the counties of Madison and Oneida, New York, were not in existence in 1795 at the time of the transaction complained of in this action"; and
>
> (b) "no evidence has been presented to show that the Counties . . . acted other than in good faith when they came into possession of the County Land in the claim area subsequent to 1795 and prior to January 1, 1968."

4. On October 5, 1981, this Court entered judgment against the Counties in favor of the plaintiffs as follows:

> (a) Against the County of Madison, $9,080; and
> (b) Against the County of Oneida, $7,634.

The Court also ordered that interest in the amount of 6% per annum run on the foregoing amounts from January 1, 1968.

5. The third-party plaintiffs believe that all facts on the issue of their liability to the Oneida Indians and the only facts of significance as between the Counties and the State have been determined by the Court. All that remains are issues of law.

6. The third-party plaintiffs, therefore, respectfully submit that they are entitled to summary judgment against the State of New York on the following grounds:

> (a) The law in the circumstances here presented requires the State to indemnify the Counties since the State is the party which actually committed the wrongful act;
>
> (b) The State by statute has waived its Eleventh Amendment immunity from the third-party claims asserted by the Counties. This waiver is contained in either N.Y. Real Prop. Acts. Law § 1541, or N.Y. State Law § 10, or both;
>
> (c) Congress, by enacting 28 U.S.C. § 1362, abrogated the Eleventh Amendment immunity of the State in third-party complaints brought in actions concerning property rights in aboriginal lands; and
>
> (d) N.Y. State Law § 10 requires the Governor, at the expense of the State, to defend actions such as this. The Governor has failed to do so. Therefore, the Counties are also entitled to recover those expenses and attorneys' fees incurred in the defense of this case and in the prosecution of these third-party claims.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*, Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

[TRANSCRIPT OF DECISION OF COURT DICTATED FROM BENCH ON MAY 5, 1982]

Transcript of a Decision taken on May 5, 1982, at the United States Courthouse, Auburn, New York, before the HONORABLE EDMUND PORT, United States District Court Judge in and for the Northern District of New York, presiding.

APPEARANCES:

FOR THE PLAINTIFFS: (Oneida Indian Nation of New York)	ARLINDA F. LOCKLEAR, ESQ.
FOR THE DEFENDANT and THIRD-PARTY PLAINTIFF: (County of Oneida, et al)	ALLAN van GESTEL, ESQ.
FOR THE THIRD-PARTY DEFENDANT: (State of New York)	ROBERT ABRAMS, Attorney General of the State of New York, By: JEREMIAH JOCHNOWITZ, ESQ., Assistant Solicitor General, Of Counsel.

THE COURT: All right, Miss Locklear, Gentlemen, you people have all appeared before me on previous occasions and you know that my usual custom is to dictate my Decision on the record following the argument, or following a brief interval after the argument, in order to give me an opportunity to study any new material that might have been presented during the argument.

On this occasion, I want to compliment counsel on their presentation because there was, the matter was so completely covered in the Briefs that I think it left little new for counsel to explore in the oral arguments. I don't feel it is necessary for me to write or speak very much about this. If the case requires further proceedings, as it appears it will, I am sure that the Courts above will have plenty to say. In any event, realistically we all know that all I am doing is shooting the starter's gun. The determination at the finish line will result from a Decision other than this Court's.

It makes me think of Lincoln's Gettysburg address where he said, not realizing the impact of what he was saying at the time, that the world would little note nor long remember what we say here. Well, I think we can literally apply it. The important things will be said subsequently. The lawyers are intimately familiar with the background of this case; they've, some of you, have lived with it from its inception, as I have. Others are second generation. I guess the case has got a life of its own.

Very briefly, in the second part of the trifurcated trial that we had in this case, I found that the Plaintiffs were entitled to a Judgment in the sum of some $16,000-plus against, some part against the County of Oneida and part against the County of Madison for the occupation of various lands within those counties resulting from a violation of the Non-Intercourse Act of 1793.

The parties in the third phase of the trial, which we are not engaged in, which is a claim-over by the Counties against the State -- the parties agree that the claim based on indemnity presents no factual issues and can be decided upon the two motions that are presently before me.

The Third-Party Defendant, the State of New York, relies mainly, at least, on the State's sovereign immunity and the bar of the Eleventh Amendment as grounds for the dismissal of the claim against them.

In argument, I think it is fair to say that the State concedes that absent a waiver there would be jurisdiction. I say, "Absent a waiver". I am talking about a complete waiver to sue in the Federal Courts as well as the State. As I indicated during the argument, treating the State's claims generously, I think it can be said that they further claim, or they did further claim that indemnity does not lie, although it hinged to the subject matter jurisdiction, it seems, but they seem to take the position that you are barking up the wrong tree, Counties, because you

are talking about a claim that arises out of our acquisition in violation of the Non-Intercourse Act whereas in truth what you are complaining about relates to our disposition of the land rather than our acquisition. And it argues that the claim is a matter of State law and not Federal law which would result in a failure of Federal jurisdiction, Federal question jurisdiction.

The County, on the other hand, lays it claim principally on three statutes, two State statutes and one Congressional enactment. They say that the State has waived its immunities through the enactment of Section 1541 of the Real Property Actions and Proceedings -- does that end with an Act?

MR. VAN GESTEL: Law.

MR. JOCHNOWITZ: Law.

THE COURT: -- Law. And Section 10 of the State Law of New York and they additionally point to 28 U.S.C. Section 1302 as the basis of waiver. The Counties contend that it is entitled, or they are entitled to indemnification because, otherwise, the State would be unjustly enriched. They also put forward the contention that the Counties' violation found by the Court was in the nature of a technical violation resulting from their mere occupancy, possession of the land, whereas the State is the real culprit having initially violated the Non-Intercourse Act as the Court found.

As I indicated, I can see, I was going to say imagine, but I won't. I can see in the State's Brief that they say there is no right to indemnification but getting down to the core of the matter, the State stresses more strongly the immunity of the State which in turn revolves on whether or not there is a waiver of immunity to this suit.

In addition to the statutes, the Counties, en passante, almost whispered somewhere in their Brief that a waiver could result from, and I am quoting now, "Congress acting pursuant to the authority delegated to it by the States under the Federal

Constitution." Fitzpatrick -vs- Bitzer, 427 U.S. 445 (1976) . . . or by a particular course of conduct such as engaging in interstate commerce. Pardee -vs- Terminal Railroad of Alabama, 377 U.S. 184 (1964." Memorandum of the County in support of the Motion For Summary Judgment, hereinafter the Counties' Memo, if I refer to it, at Page 9. Then lastly the Counties assert that since the Third-Party Complaint is within the ancillary as distinguished from the pendent jurisdiction of the Court, independent Federal jurisdiction is not necessary to support the third-party claim.

After a careful consideration of the Briefs and a review of the pertinent cases, I have concluded that the motion of the State to dismiss the third-party claim should be denied and the cross-motion of the Counties seeking indemnification should be granted.

Jurisdiction over the main action is unquestioned. The Supreme Court decided that. Otherwise we wouldn't even be here. The claim for indemnity obviously arises out of the same core of facts as the original claim, that is, the violation of the Non-Intercourse Act. Consequently, ancillary jurisdiction of the third-party action for indemnity exists, Dery -vs- Wyer, 265, F.2d, 804 (2nd Cir. 1959). Cited as authority in the Counties' Brief is the controlling law in this Circuit and has been consistently followed by the District Courts. E.C. Ayer -vs- General Dynamics Corporation, 82 FRD 115 (SDNY, 1979), Ross -vs- Penn Central Transportation Co., 433 F. Supp. 308 (WDNY, 1977). Aldinger -vs- Howard, 427 U.S. 1 (1970) does not destroy the jurisdiction of the Court over the indemnity claim asserted by the Counties against the State. In Aldinger, the Plaintiff attempted to assert an additional State-based claim against a Defendant over whom the District Court had no jurisdiction under 1983 as then construed. Section 1983, I believe it is Title 42, Section 1983. In this case, the Defendant Counties, Third-Party Plaintiffs, are asserting a

claim fashioned in the mode of the Federal common law, (I believe that was the expression used by the Supreme Court) against the Third-Party Defendant State which I find has subjected itself to the jurisdiction of the Court by both the enactment of the Non-Intercourse Act by Congress and, although I don't regard it as necessary, if necessary, its consent to jurisdiction by entering into the 1705 Treaty in violation of that statute.

By enactment of the Non-Intercourse Act, the Congress has abrogated the State's sovereign immunity. The State, by entering into the 1705 Treaty, has consented to subject itself to the jurisdiction of the Federal Court. I think Judge McCurn's case will support that as well. Oneida against State of New York, 520 F.Supp. 1278, 1307-1308.

For me, Pardee -vs- Terminal Railroad Co. of Alabama, 377 U.S. 184 (1964) points the way to this result, the States "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce", Pardee at 191.

New York, along with the other original signatories to the Constitution, likewise surrendered a portion of their sovereignty by granting Congress the power "to regulate commerce with the Indian tribes", Constitution, Article I, Section 8, Clause 3. Pursuant to the power granted it by the Constitution, the Congress enacted the Non-Intercourse Act of 1790. The Act has not materially changed its pertinent provisions and is now codified at 25 U.S.C. Section 177. In pertinent part it provides, "No purchase, grant, lease or other conveyance of lands or of any title or grant thereto, from any Indian nation or tribe of Indians, shall be of any validity or equity" unless certain conditions were met. Now, I have underscored no purchase and any validity. It's been found that the 1705 transfer to the State violated the Act. As in Pardee, when the Congress said, "No purchase; any validity"; it meant what it said and this included the purported grant by the 1705 Treaty. "When a State leaves the sphere that is exclusively its own and

enters into activities subject to Congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation". Pardon at 186.

The fact that the Non-Intercourse Act applies to New York, of course, supplies the major premise without which the Judgment in this case could not be sustained. The initial Judgment could not be sustained, if the arguments of the Counties are subsequently accepted that the Act doesn't apply to the State of New York. As the Court held in Pardon to hold the State subject to the Non-Intercourse Act but immune from suit would leave the Act meaningless; it would tear the guts right out of it; it seems.

To paraphrase Pardon, "It would be a strange situation indeed if the State could be held subject to the " -- I am inserting Non-Intercourse Act -- " and liable for a violation thereof and yet they could not be sued without its expressed consent. The State by " -- and again I am interjecting, procuring the conveyance of the land from the Oneidas so that rephrased Pardon would read, "The State by procuring the conveyance of land from the Oneidas and thereby subjecting itself to the Act must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent", citing Maurice -vs- State, 43 California Appellate 2d 270 at 275-277, 110 P 2d 708 at 710-711. In my view the fact that Alabama was operating a railroad business for profit in the Pardon case doesn't dilute its authority.

In Fitzpatrick -vs- Bitzer 445 U.S. 445 at 451-452, (1976) the Court in distinguishing Edelman said, "Edelman went on to hold that Plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as Pardon -vs- Terminal Railroad Company, 377 U.S. 184, (1964), and Employees -vs- Missouri Public Health Department, 411 U.S. 279, (1973), because the necessary predicate for that doctrine was Congressional intent to abrogate the immunity conferred

by the Eleventh Amendment". The fact that it happened to be the railroad business I think was just a coincidence.

Congress by its enactment of the Non-Intercourse Act and its subsequent re-enactment after the adoption of the Eleventh Amendment, clearly evidences an intent to avoid the amendment's immunity.

As I indicated before, I think under the circumstances disclosed, the provision of the Constitution giving Congress the power to regulate trade with the Indians and the subsequent enactment and re-enactments of the Non-Intercourse Act indicate that New York's consent to this waiver isn't even necessary. Nevertheless, New York has by its conduct consented to jurisdiction in the Federal Court. Consent can be inferred from New York's treaty with the Oneidas. The treaty was executed on September 15th, 1795, about nine months after the ratification of the Eleventh Amendment. As a matter of fact, the State of New York was the first state to ratify the Eleventh Amendment so they quite apparently had a keen interest in the amendment which developed.

Kentucky was the ninth state providing the three-quarters of the states necessary to enact the Eleventh Amendment and they ratified the amendment on December 7th, 1794. At that time the amendment, of course, was effective under the Constitution. Article V, Dillon -vs- Glos, 256 U.S. 368, (1921), held quite clearly that the amendment becomes effective in accordance with the express language of the Constitution upon its ratification by three-quarters of the states.

Now, peculiarly in looking for the effective date of the amendment, it appears that it was, I guess, years, a couple of years later before the President proclaimed the amendment had been ratified by three-quarters of the states. But without going into the questions of the timing I think it is indicative of New York's consent. Particularly treating the earlier action, the ratification date as December 7th, 1794. It would not

materially affect the consent even treating the President's proclamation as the date of the amendment because I think the inference at that time under the old Chisholm case making the Eleventh Amendment necessary would pretty much tell the State that they were subject to jurisdiction of affairs concerning trade with the Indians.

And, incidentally, as my predecessor used an expression, he wouldn't pound the table, and I wouldn't pound the table about this Decision, either. I think it's a very murky area that probably is deserving of much greater study in depth than was afforded either in the presentation or determination of these motions.

In view of my Decision, it really isn't necessary to say much, if anything, about the other statutory alleged bases for a waiver. Section 1541 and Section 10, -- I think there was so much emphasis laid on them in the Briefs that I should comment even though briefly about them.

In Section 1541, the State of New York waives its immunity in an action brought by a person claiming an estate or interest in real property to compel the determination of any *claim adverse to that of the Plaintiff* which the Defendant makes or which the Defendant might make. The State maintains the waiver is inapplicable since the claim brought against it is not within the purview of the section. To my thinking, I think the State is clearly correct on the plain language of the statute. It doesn't appear, or it hasn't appeared to me in all the years that I have been connected with this case that the State makes a claim adverse to the Counties at all. I think they were as solid as a block of granite up to this motion. They both claimed that the State had a valid title and that the State had a valid conveyance from the Oneidas on a number of grounds.

Then the Counties concede, contrary to their position, that this Circuit in Oneida -vs- New York, 443 F.2d 415 (Second Cir., 1971) holds that Section 1541 "Did not constitute consent by the State of New York to be sued in Federal Courts". Counties' Memo Pages 18, 19. They adjure me to disregard Knight because Judge Friendly "noted in his Opinion that the parties had not argued the question: 'in their exceedingly unhelpful Briefs'." They further assert that, "Had he been afforded the benefit of a full adversarial presentation of the issue, it's quite likely he would have reached the opposite result". Counties' Memo Page 19. I can't agree with either conclusion. Judge Friendly pointed out that the parties had omitted from their "exceedingly unhelpful Briefs" a stronger basis than that presented for excluding the action from the reach of the Eleventh Amendment so he immediately set himself up as sort of counsel; he presented the argument. Then he set himself up as a Judge and considered the argument and said that it wouldn't hold.

Now, I think the Counties know that I can't and wouldn't disregard Knight as cavalierly as they indicate I should. A Decision of the Court of Appeals in this Circuit is not persuasive to the District Court; it is binding on it. Hurley -vs- Hurley, 49 N.Y. 2d 78, (1980), does not alter the situation, either. Hurley merely held that the part of the Complaint within Article XV could be maintained in the New York Supreme Court but that the counts seeking damages would have to be relegated to the Court of Claims. I read Hurley a couple of times and nowhere in Hurley do I, can I find that Section 1541 constitutes a waiver of the bar of the Eleventh Amendment to a suit in the Federal Court.

Counsel also rely on Section 1362. I agree with Judge McCurn that 1362, 28 U.S.C. 1362, would form the basis for jurisdiction in an action under that section, but I don't have to rely nor do I rely on that section as the basis of this Decision.

Section 10 of the New York State Law can be disposed of almost summarily. It is without any judicial gloss. Apparently there have been no cases in the Court, at least no reported

cases. From the plain language of the section it seems that the Legislature meant to apply it to actions brought, as one of the conditions, brought for the recovery of land.

Now, the Plaintiffs in this case very pointedly throughout the litigation made it clear that they were not seeking the recovery of land. In one of my earlier Decisions, I distinctly remember crediting the Oneidas and praising them for the, I would say, delicate manner in which they sought to have this question determined with as little disruption as possible. Subsequent cases, when the silk glove didn't work and mailed fists become the mode of the day, sought le: peaceable ways of resolving Indian land conflicts. I think the very fact that this was not an action for the recovery of land, certainly in the absence of any judicial gloss on Section 10, excluded it from the coverage of that section. The Legislature could certainly be sustained in their judgment if they sought to cover a situation where the disruptions attendant to an action to recover land was brought and not one which they could reasonably regard as less disrupting where damages only are sought so that -- then go one step further. It's hard for me to conceive that even assuming arguendo as the Counties do that Section 10 constitutes a waiver of the State's immunity to sue, it still falls far short of a waiver of the Eleventh Amendment to suits in the Federal Courts. This is one of the rare times when I think that I have taken longer to state my so-called brief reasons on the record than counsel have taken in presenting their arguments. That in no way reflects on the sufficiency of the arguments because as I indicated earlier the Briefs presented everything that certainly was necessary; that certainly was helpful to the Court.

I thank counsel for their Briefs.

Now, there is one thing accordingly as I indicated, I find that the motion of the State to dismiss should be denied. The motion of the Counties is granted.

Judgment should be entered in favor of the Counties and against the State.

Off the record.

(Discussion off the record.)

THE COURT: I direct, if it meets with everyone's satisfaction, I think that this is probably the best way to do it -- to resolve the question of the entry of Judgment in accordance with the Decision -- if I direct in my Order granting the Third-Party claims Summary Judgment in favor of the Counties and denying the motion of the State that I direct that the attorney for the Counties prepare and present to Mr. Jochnowitz a Proposed Judgment. If you are unable to agree on the form of a Judgment, then present it to the Court within fifteen days; that Judgment can be settled on three days' notice, or if you need longer, five days' notice.

(CONCLUSION OF PROCEEDINGS.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v. THE STATE OF NEW YORK, Third-Party Defendant.	No. 70-CV-35

ORDER [OF MAY 5, 1982]

EDMUND PORT, Judge

The State of New York third-party defendant having moved to dismiss the third-party complaints of the County of Oneida, New York and the County of Madison, New York, and the County of Oneida, New York, third-party plaintiff and the County of Madison, New York, third-party plaintiff each having moved for summary judgment in its respective favor against the third-party defendant State of New York, and the plaintiffs having moved for leave to appear and file a memorandum as amicus curiae in support of third-party plaintiffs' claim for indemnity and the Court having heard counsel for all parties and having dictated its decision on the record, upon all of the proceedings had herein, it is

ORDERED, that the motion of the State of New York, third-party defendant to dismiss third-party complaints against it be and the same hereby is denied and it is further

ORDERED, that the motion of the County of Oneida, New York, third-party plaintiff and the motion of the County of Madison, New York, third-party plaintiff for summary judgment in favor of each county against the State of New York, third-party defendant be and the same hereby are granted and it is further

ORDERED, pursuant to the consent of all parties that the plaintiffs be and they hereby are granted leave to appear as amicus curiae and it is further

ORDERED, that judgment in accordance herewith be agreed upon by the parties and filed with the Court within fifteen days from the date hereof or judgment may be settled upon five days notice. The attorney for the third-party plaintiffs is to draw a proposed judgment and submit it to the attorney for the third-party defendant for approval.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 5, 1982
Auburn, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

JUDGMENT ON THIRD-PARTY COMPLAINTS
[OF MAY 19, 1982]

A motion by the Counties of Madison and Oneida, New York, (the "Counties"), as third-party plaintiffs above-named, for summary judgment in their respective favor against the State of New York as third-party defendant on their third-party complaints, having been duly brought on to be heard, and the Court on May 5, 1982 having made an order pursuant

thereto granting the Counties' motion and directing that judgment be entered herein in their favor ordering that the State of New York indemnify the Counties for any sums for which they may be held liable to the plaintiffs, it is hereby

ORDERED, ADJUDGED and DECREED that the Counties of Madison and Oneida, New York, third-party plaintiffs herein, are awarded judgment upon their respective third-party complaints against the State of New York for any portion of the plaintiffs' recovery herein directed or awarded, including any interest thereon, that is paid by either or both of the said Counties, together with interest at the rate of 6% per annum from the date of any such payment.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 17, 1982
Auburn, New York

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,
Plaintiffs,
-against-

NOTICE OF APPEAL
70-CV-35

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,
Defendants and
Third-Party Defendants,
-against-
THE STATE OF NEW YORK,
Third-Party Defendant.

NOTICE IS HEREBY GIVEN that the State of New York, third-party defendant in the above actions, appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in the Office of the Clerk of the Northern Dis-

trict on May 19, 1982 and from the final order in said matter dated on May 5, 1982, both entered in the above action.
Dated: May 21, 1982

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Third-Party Defendant

By _____
JEREMIAH JOCHNOWITZ

TO: HON. J. R. SCULLY
Clerk
United States District Court
for the Northern District of New York
Federal Post Office Building
Utica, New York 13503

TO: GOODWIN, PROCTER & HOAR, ESQS.
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28 State Street
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Attorney for Plaintiffs
appearing as *amicus*
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Washington, D.C. 20036

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 70-CV-35

THE COUNTY OF ONEIDA, NEW YORK, et al.,
Defendants.

Notice of Appeal of the Counties of Madison and Oneida, New York.

Pursuant to Fed. R. App. P. Rules 3 and 4, notice is hereby given that the defendants, the Counties of Madison and Oneida, New York, hereby appeal to the United States Court of Appeals for the Second Circuit from all interlocutory judgments and orders adverse to the Counties heretofore entered herein, the final judgment of this Court, Port, J., having been entered on the 19th day of May, 1982.

Respectfully submitted,

Allan van Gestel
GOODWIN, PROCTER & HOAR,
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: June 11, 1982.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 545, 546, 643—August Term, 1982

Argued: January 18, 1983 Decided: September 29, 1983

Docket Nos. 82-7436, 82-7486, 82-7526

[719 F.2d 525 (2d Cir. 1983)]

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA INDIAN NATION OF NEW YORK, a/k/a THE UNEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Plaintiffs-Appellants-Cross-Appellees,

—against—

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants-Third Party Plaintiffs-Appellees-Cross-Appellants,

—against—

STATE OF NEW YORK,

Third Party Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,
Circuit Judges.

Appeal from an order of the United States District for the Northern District of New York, Edmund Port, *J.*, holding the Counties of Oneida and Madison, New York liable to the Oneida Indian Nation under the Trade and Intercourse Act of 1793, awarding the Oneida Indian nation $16,694 against the two Counties, and finding that the State of New York must indemnify the Counties for all damages assessed against them.

Affirmed and remanded for a recalculation of damages.

Judge Meskill dissents in a separate opinion.

ARLINDA LOCKLEAR, ESQ., Washington, D.C. (Lawrence Aschenbrenner, Esq., Native American Rights Fund, Washington, D.C., Francis Skenandore, Esq., Oneida, Wisconsin, Norman Dorsen, Esq., New York, N.Y., of counsel), for Oneida Indian Nation of Wisconsin and Oneida of the Thames Band.

BERTRAM E. HIRSCH, ESQ., Floral Park, N.Y., for Oneida Indian Nation of New York.

JEREMIAH JOCHNOWITZ, Assistant Solicitor General, Albany, N.Y. (Robert Abrams, Attorney General of the State of New York, Peter H. Schiff, Acting Attorney in Chief Appeals and Opinions, Albany, N.Y., of counsel), for State of New York.

ALLAN van GESTEL, ESQ., Boston, Massachusetts, (Jeffrey C. Bates, Esq., Laura L. Carroll, Esq., Goodwin, Procter & Hoar, Boston, Massachusetts, of counsel), for County of Oneida, New York, and County of Madison, New York.

ROBERT T. COULTER, ESQ., Washington, D.C. (Curtis G. Berkey, Esq., Steven M. Tullberg, Esq., Indian Law Resource Center, Washington D.C., of counsel), for Amicus Curiae The Houdenosaunee.

LUMBARD, *Circuit Judge*:

All three parties appeal from the judgment of the Northern District of New York, Edmund J. Port, *Judge*. The defendants, Counties of Oneida and Madison, New York, appeal from Judge Port's decision holding them liable for wrongful possession of plaintiffs' land. 434 F. Supp. 527 (N.D.N.Y. 1977). Plaintiffs Oneida Indian Nation of New York State, Oneida Indian Nation of Wisconsin, and Oneida of the Thames Band Council (collectively the "Oneidas"), as well as the Counties appeal from Judge Port's decision of October 5, 1981, on damages. Finally, third party defendant State of New York appeals from Judge Port's ruling of May 5, 1982, that it must indemnify the Counties for any damages

assessed. We affirm each of Judge Port's three rulings, but remand for further proceedings on the calculation of damages.

The three plaintiffs in this case are the descendants of the Oneida Indian Nation which inhabited central New York for many years until shortly after the Revolutionary War. The Oneidas were part of the Six Nations or Iroquois, the most powerful tribe in the Northeast.[1] Their land extended from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains.[2] During the Revolutionary War, the Oneidas were active allies of the colonists against the British. Their support prevented the Iroquois from taking a unified stand against the colonists—an important achievement for the confederated states.

After the War, the United States rewarded the Oneidas in the Treaty of Fort Stanwix, 7 Stat. 15 (October 22, 1784), by securing them "in the possession of the lands on which they are settled." Later, two additional treaties further secured the Oneidas in the possession of their land. *See* Treaty at Fort Harmar, 7 Stat. 33 (January 9, 1789); Treaty with Six Nations, 7 Stat. 44 (November 11, 1794). The settlers of the new nation, however, in their constant fever to expand soon invaded the Indians' territory. Thus, under increasing pressure from its white residents, the State of New York in 1788 purported to

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1 The Iroquois were composed of six tribes: the Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora.

2 Earlier in their history, before the influx of settlers, the Iroquois' land "extended from the hills of New England to the Mississippi River and from upper Canada into North Carolina." F. Cohen, *Handbook of Federal Indian Law* 417 (University of New Mexico Press reprint of 1942 ed.) (*Federal Indian Law*).

purchase most of the Oneidas' land—nearly five million acres.[3] The Oneidas retained about 300,000 acres near Oneida Lake.

As the pressure of new settlements everywhere continued to increase, the Indians became restive. In recognition of the frequently inequitable land purchases and to prevent Indian retaliation, the newly created federal government took an active role in protecting and securing the Indians in the possession of their land. President Washington and his Secretary of War, Henry Knox, encouraged Congress to enact legislation which recognized "that the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not be divested thereof, but in consequence of fair and bonafide purchases, made under the authority, or with the express approbation, of the United States." *American State Papers*, 1 *Indian Affairs* 53 (1834). Accordingly, Congress passed the Trade and Intercourse Act of 1790, Ch. 33, 1 Stat. 137 (hereinafter "1790 Act") which provided:

> [t]hat no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a [federal] license . . . [and] [t]hat no sale of land made by Indians . . . shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id. at 137-38.[4]

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3 Much of this land is presently the subject of another lawsuit, *see Oneida Indian Nation of New York v. New York*, No. 78-104 (N.D.N.Y. filed December 5, 1979).

4 Section four of the 1790 Act states in full:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States,

The 1790 Act, however, was primarily declarative. It provided few enforcement mechanisms for protecting federal or tribal interest. Because it did little to stem the increasing illegal occupation of Indian lands, Congress in 1793 enacted a second Trade and Intercourse Act that added criminal penalties for illegally occupying Indian lands and authorized the President to remove trespassers from the land. Trade and Intercourse Act of 1793, Ch. 19, § 8, 1 Stat. 329, 330-31 (hereinafter "1793 Act"). The 1793 Act also provided that "informants" could enforce the section imposing fines on violators and collect one-half of the fine assessed.

Despite these statutory prohibitions, the State of New York attempted in 1795 to obtain Indian lands without the requisite federal approval. Throughout the ensuing months, the federal authorities repeatedly urged New York State Governor Clinton and his successor Governor John Jay to seek and secure the appointment of federal commissioners before the State negotiated any purchase of Indian lands. *See* 434 F. Supp. at 534-35. Despite this, the State sought an agreement with the Oneidas during the summer of 1795, over the express remonstrance of the federal authorities. *See id.* at 534. These negotiations led to the sale on September 15, 1795, in Albany, in contravention of the 1793 Act, of approximately 100,000 acres of the Oneidas' reservation. As the district court noted, however, the circumstances surrounding the Oneidas' assent to the purchase were fraught with irregularities. *Id.* 535. First, the Oneidas virtually never signed treaties outside their aboriginal land, yet the treaty was

shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

signed in Albany outside their aboriginal land boundaries. Second, normally the Oneidas' treaties were agreed to by unanimous consensus of the tribe; here, however, powers of attorney were given to individuals, none of whom were chiefs, to negotiate the transaction. Third, the State purchased the land for approximately fifty cents per acre. Within two years, the State in turn sold much of the land to white settlers for about $3.53 per acre.

Social and economic forces, including poverty, famine, alcoholism, and pressures on the Oneidas to move West resulted in the alienation of virtually all of their remaining New York acreage. Between 1795 and 1846, twenty-five more treaties between the State and the Oneidas were consummated, enabling the State to divest the Oneidas of all but a few hundred acres. Only two of these treaties (concerning land not here in question) were made with federal supervision and approval.[5] Furthermore, the State passed a statute that divided up the tribal landholdings and gave individual Indians a right to sell.

New York's abuse of the Oneidas was not accomplished without protest. Shortly after the 1784, 1787, and 1788 land purchases, the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. *See American State Papers*, I *Indian Affairs* 139 (1834). Their protest continued, especially between 1840 and 1875, and between 1909 and 1965. *See* 434 F. Supp. at 536.

Finally, in 1970 the Oneidas brought suit in the Northern District of New York claiming that the 1795

5 It has been estimated that the "State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government." *Federal Indian Law* at 420 n.24.

cession of land violated the Nonintercourse Act, and that the land was unconscionably purchased for an inadequate price. The complaint sought damages for the fair rental value of 871.92 acres which were part of the 1795 land transfer, for the period from January 1, 1968 to December 31, 1969. The district court on November 4, 1971, dismissed the complaint ruling that it asserted only a state law claim. Our affirmance over one judge's dissent, 464 F.2d 916, 918 (2d Cir. 1972), was unanimously reversed by the Supreme Court which held:

> Tribal rights [are] entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the 'power of Congress . . . is supreme.'
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> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.

414 U.S. 661, 669-70 (1974) (footnotes and citation omitted).

On remand, Judge Port trifurcated the proceedings, dividing the case into separate trials on the issues of liability, damages, and indemnity. First, Judge Port held that the State's 1795 purchase violated the 1793 Act. He later assessed the Counties $16,694 in damages plus interest. In addition, Judge Port over the State's principal objection on eleventh amendment grounds held that the State must indemnify the Counties for all damages assessed.

I.

LIABILITY

Plaintiffs claim two bases for a finding of liability in this case: federal common law and the 1793 Nonintercourse Act.[6]

(A) *Federal commmon law.*

The Counties assert that the Oneidas had no federal common law rights at the time of the 1795 purchase, and alternatively that whatever common law action there may have been was preempted by the Trade and Intercourse Act. We reject both contentions.

The interrelationship of the Indian nations and the United States—including its constituent states—early in the new nation's history was recognized as involving uniquely federal interests. The Constitution reflected this concern by delegating to the federal government the authority to "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This federal interest in regulating Indian affairs was enunciated not only in treaties, *see, e.g., Treaty of Fort Stanwix*, *supra*, and statutes, *see, e.g.*, Trade and Intercourse Act of 1790, *supra*, but also in the recognition by the courts of the availability of a federal common law action to vindicate Indian land claims. The Supreme Court referred to this proposition in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), one of its earliest cases involving the transfer of Indian land. Although the case involved a title dispute

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[6] Judge Port found a violation of the Trade and Intercourse Act of 1793. In formulating a remedy, however, he looked to the common law.

between non-Indians, the Court subsequently interpreted the case to stand for the general principle "that an action in ejectment could be maintained on an Indian right to occupancy and use . . . . This is the result of the decision in *Johnson v. M'Intosh*." *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850). Furthermore, the Court repeatedly has emphasized that this Indian right to occupancy and use is a federal right. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 670 (1974) (it is a "rudimentary proposition" that after the Constitution was "adopted, these tribal rights to Indian lands became the exclusive province of the federal law."); *see also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 626 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981) ("the extinguishment of all Indian title was meant to be a matter of federal concern"). In the prior appeal in this case, the Supreme Court alluded to the existence of a common law action on several occasions in mandating the exercise of federal jurisdiction. "[A] tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.' . . . nevertheless [it is] entitled to the protection of federal law . . . ." *Oneida Indian Nation*, 414 U.S. at 669, quoting *U.S. v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941). "Absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. We conclude that the Oneidas may assert a federal common law action to recover damages for the Counties' wrongful possession of their land.

The Counties, however, argue that this federal common law action was preempted by the enactment of the Trade and Intercourse Act. They cite *Milwaukee v. Illinois*, 451 U.S. 304 (1981), in which the Supreme Court held that a

subsequently enacted federal statute preempted the federal common law cause of action it previously had upheld in *Illinois v. Milwaukee*, 406 U.S. 91 (1972). In *Illinois v. Milwaukee* the Supreme Court recognized the existence of a federal common law action for abatement of a public nuisance in polluted interstate waters. Nine years later, however, the Court found in *Milwaukee v. Illinois* that such an action could no longer be maintained. In the intervening years, Congress had passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter "FWPCA"). Under these lengthy amendments and their appurtenant regulations, it is illegal for anyone to discharge pollutants into American waters without a permit. 33 U.S.C. §§ 1311, 1342. (1976 ed. & Supp. III). Moreover, the discharge permitted is restricted to effluent limitations established by Environmental Protection Agency regulations. The statute provided for dual enforcement both by the federal government and by citizen suits. *See id.* §§ 1319 & 1365. It specifies the relief that may be obtained, the ranges of monetary penalties for various violations, and authorizes imprisonment in certain cases. *Id.* § 1319(c). Other aspects of the statute include grants for research, water treatment works, and water pollution standards. *See generally id.* §§ 1251 et seq. Under these circumstances the Court concluded that "Congress ha[d] not left the formulation of appropriate [pollution] standards to the courts . . . but rather ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee v. Illinois*, 451 U.S. at 317. Thus, when Congress "speaks directly to a question," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), that originally "rested on federal common law, the need for such an

unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. at 314.

This case is quite different. The Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. Rather, the Acts augmented the protection of Indian property rights previously afforded by federal common law by adding an additional statutory prohibition. This statute, *inter alia*, voided all land transactions in which Indians were a party that were consummated without federal approval. Furthermore, the 1793 Act both authorized the intervention of the President and the federal government on behalf of the Indians, and established criminal penalties for violations of the Act.[7] None of these statutory provisions expressly subsumed the common law modes of relief. There is no evidence to suggest that Congress intended to deny common law remedies to the Indians. In an analogous area involving congressional extinguishment

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[7] Section eight states in full:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made bya treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

of Indian land titles, the Supreme Court has stated that evidence of such congressional intent should be "plain and unambiguous," and would "not be lightly implied in view of the avowed solicitude of the Federal Government for the Welfare of its Indian wards." *U.S. v. Santa Fe Pacific*, 314 U.S. at 346, 354. Neither should we imply a congressional intention to extinguish the Indians' common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire. Accordingly, we hold that the district court had jurisdiction to grant relief under federal common law.

(B) *Trade and Intercourse Act.*

Judge Port premised liability in large part on the State's violation of the 1793 Trade and Intercourse Act. On appeal, the State apparently does not question Judge Port's holding that the Act was violated. The 1793 Act explicitly required federal approval of a land purchase such as the 1795 cession. No such federal approval was obtained. The Counties, on the other hand, proffer five arguments in seeking to avoid liability: first, that the Trade and Intercourse Acts did not provide for a private suit for the enforcement of their provisions; second, that if such a suit could be maintained it abated upon expiration of the 1793 Act; third, that the Oneidas' claims are barred by the statute of limitations; fourth, that the claims are non-justiciable, and fifth, that the federal government subsequently ratified the 1795 transaction.

Implied Cause of Action.

It is beyond dispute that the Nonintercourse Acts were enacted for the protection of Indian tribes as beneficiaries. However, "the focus of [our] inquiry is on

whether Congress intended to create a remedy," *California v. Sierra Club*, 451 U.S. 287, 297 (1981). In resolving that question the Supreme Court has recently given us guidance:

> Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change. When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.
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> In view of the absence of any dispute about the proposition prior to the decision of *Cort v. Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the 'contemporary legal context' in which Congress legislated in 1974. *Cf. Cannon v. University of Chicago*, 441 U.S., at 698-699.

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-75, 381 (1982).

When, prior to *Cort v. Ash*, 422 U.S. 66 (1975), an implied private remedy was part of the "contemporary legal context" in which Congress legislated, Congress will be deemed to have intended to preserve the remedy. *Id.*,

379-80; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

Application of these basic principles leads us to the conclusion that in enacting the Nonintercourse Acts Congress must have expected that they would be enforced by private actions since they were clearly intended for the benefit of the Indian tribes. The federal statutory structure was extremely simple and had not even approached the complexity which led to the adoption of the *Cort v. Ash* requirements. Indeed, the right to enforce the Acts through private actions has been assumed by various lower federal courts. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 805 & n.3 (D.R.I. 1976). Private enforcement has also been favored because of the federal government's poor performance of its statutory obligation to protect the Indians.[8] The congressional directives embodied in the Nonintercourse Acts frequently have been disregarded by the executive branch. *See, e.g., Narragansett Tribe*, 418 F. Supp. at 806 & n.4. Thus, by necessity, Indian tribes have been permitted to enforce the

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8 *See, e.g., United States v. Aktanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957):

> The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting "the generous and protective spirit which the United States properly feels towards its Indian wards," *Oklahoma Tax Comm. v. United States*, 319 U.S. 598, 607, 63 S. Ct. 1284, 1288 87 L.Ed. 1612, and the " 'high standards for fair dealing' required of the United States in controlling Indian affairs," *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 67 S. Ct. 167, 170, 91 L.Ed. 29 are but demonstrations of a gross national hypocrisy.

Acts. In any event we believe that under conventional *Cort v. Ash* analysis, the Indians have an implied private cause of action to enforce the Nonintercourse Acts' proscriptions.

Cort v. Ash, 422 U.S. 66 (1975), outlines four factors to be used in determining whether Congress has intended that individuals may bring private suits to enforce a particular statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original). We consider these four factors in that order.

(1) *Beneficiaries.*

The language and purpose of the 1793 Act are unequivocal in their purpose to protect the Indians. Section 1 provides that "no person shall be permitted to carry on any trade or intercourse with the Indian Tribes without a [federally granted] license . . . ." 1 Stat. at 329. Violators of the Act "shall forfeit all the merchandise offered for sale to the Indians," and they also may be imprisoned, and fined up to $1,000. *Id.* §§ 3 & 5, at 329-30. Furthermore, "no purchase or grant of lands . . . from any

Indians [without federal approval] shall be of any validity . . . ." *Id.* at § 8, at 330-31. The statute's purpose was "to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties . . . ." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979) ("a major purpose of these acts as they developed was to protect the rights of Indians to their property").

(2) *Legislative Intent.*

The legislative history of the Nonintercourse Acts, which is sparse and incomplete, furnishes no clear expression on the question of whether Congress intended to create a private right of action for damages. Congressional committee reports generally are unavailable, and floor debates were seldom recorded. The absence of legislative history is neither unusual nor fatal. "The legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Nonetheless, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979). "[C]ongressional intent can be inferred from the language of the statute, the statutory structure," *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981), "or in the circumstances of [the statute's] enactment." *Transamerica*, 444 U.S. at 18. *See also Cannon v. University of Chicago*, 441 U.S. at 698-99; *California v. Sierra Club*, 451 U.S. 287, 296 n.7 (1981).

The circumstances surrounding the enactment of the 1793 statute show that Congress intended to provide maximum protection of Indian land—and that this protection included the power to commence a private action.[9] The earlier 1790 Act in large part was due to the efforts of President George Washington and his Secretary of War, Henry Knox. Both men were "of high integrity and had extensive experience in Indian affairs." F. Prucha, *American Indian Policy in the Formative Years*: The Indian Trade and Intercourse Acts of 1790-1834 at 43-44 (1962) (hereinafter "*American Indian Policy*"). President Washington personally appeared before Congress and warned that legislation was needed to bolster the faltering relations with Indian Tribes. *See Sen-Exec. Journal*, 1st. Cong., 1st Sess. 20-24 (1789); 1 *Annals of Congress* 933 (1790).[10] Secretary Knox urged that if it were "declared by law . . . that the Indians possess the right to all their territory which they have not fairly conveyed, and that they should not be divested . . . [except by] treaties made under the authority of the United States, the foundation

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9 We reject the State's initial contention that Indian tribes lacked capacity to sue in federal court, and thus Congress could not have intended to create a private cause of action on their behalf. Although suits by tribes may have been rare the reasons for this were cultural, not legal:

> Except for the Cherokee, who had experienced some intermarriage and infusion of Anglo-American legal concepts, the tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible.

Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 46 (1979).

10 As Secretary Knox said in a letter to North Carolina Governor Blount, quoted in *American Indian Policy* at 41: "The Indians have constantly had their jealousies and hatreds excited by the attempts to obtain their land."

of justice and peace would be laid." *American State Papers*, I *Indian Affairs* 53 (1834). The 1790 Act which followed embodied these "principles of justice and moderation, as [would] enforce the approbation of the dispassionate and enlightened part of mankind . . . [and it represented a policy of] conciliation of the Indians by negotiation . . . liberality, express guarantees of protection . . . and developed trade." *Id.* at 41, 44.

Section 4 of the 1790 Act stated that "no sale of lands made by any Indians . . . shall be valid . . . unless the same shall be made . . . under the authority of the United States." 1 Stat. at 138. Section 4's prohibition against non-federally approved Indian land sales did not carry with it any substantive penalties for its violation,[11] nor were there any mechanisms for enforcing its prohibition. Nonetheless, Congress must have intended that section 4 would be enforced by some party or institution. *See Transamerica*, 444 U.S. at 18-19. In *Transamerica*, the Supreme Court construed a securities' statute that was constructed similarly to the 1790 Act. Section 215 of the Investment Advisors Act of 1940 states that all waivers of compliance and "[e]very contract made in violation of any provision of this subchapter . . . shall be void. . . ." 15 U.S.C. § 80b-15. Like section 4 of the 1790 Act, 80b-15 simply declared that certain transactions were void. It did not explicitly provide for enforcement. Under these circumstances, the Supreme Court found that Congress intended a private right of action to enforce section 80b-15.

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11 Sections 2 and 3 which dealt with licensed traders, on the other hand, expressly included enforcement by the United States and perhaps by "informants" suits. *See* 1 Stat. at 138-39.

> By declaring certain contracts void, [section 80b-15] by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that [section 80b-15] could be raised defensively in private litigation to preclude the enforcement of an investment advisors contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.
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> For these reasons we conclude that when Congress declared in [section 80b-15] that certain contracts were void, it intended that the customary legal incidents of voidness would follow.

Transamerica, 444 U.S. at 18, 19.

By analogy, if the State violated the 1790 Act, logically the Indians would have had "the customary legal incident" of a private right of action to enforce its strictures. With no express enforcement provisions accompanying section 4, a statutory interpretation that did not permit a private right of action would render section 4 unenforceable.

As the 1790 Act was set to expire in 1793, Congress passed the Trade and Intercourse Act of 1793 in which section 8 incorporated the original language of the 1790 Act which had voided all Indian land transactions negotiated without federal approval. In addition, it provided that violation of the section was a misdemeanor punishable by a fine and imprisonment.[12] The statute also

[12] Violation of the 1793 Act was punishable by a fine up to $1,000 and imprisonment not to exceed twelve months. 1793 Act § 8, 1 Stat. at 330.

authorized the executive branch, at the discretion of the President, to remove violators from Indian land. Other sections regulating trade with the Indians also were added to the Act, with penalties for their violation.[13]

These upgraded remedies were designed to correct the perceived shortcomings of the 1790 statute. The 1790 Act had failed to protect the Indians adequately from predatory encroachment, trade, and land purchases. President Washington had urged Congress in his 1791 annual address to enact an "efficacious provision . . . inflicting adequate penalties upon all those who, by violating [the Indians'] rights, shall infringe the treaties and endanger the peace of the Union." 'Third Annual Address, President George Washington,' 1 *Messages and Papers of the President*, 105 (Richardson, ed., 1896). He renewed his plea in late 1792 stating, "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier

[13] The significant additions to the Trade and Intercourse Act included: Section one prohibited trade with Indians without a federally granted license. To obtain such a license, a licensee had to submit a $1,000 bond. Section two permitted the recall of the license, as well as recourse to the bond for any breaches of conditions placed on the licensee. The third section penalized unlicensed trading with Indians by imposing forfeiture of the merchandise traded, and a fine and imprisonment up to $100 and 30 days respectively. Crimes committed against Indians on Indian land were to be treated as if committed on non-Indian land under section 4. Section 5 proscribed settlement on Indian land with an attendant fine between $100 and $1,000 and imprisonment not to exceed twelve months for any violations of the section. The President was also authorized to remove unlawful settlers. Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory," and provided that persons purchasing horses without such a special license would forfeit both the horse and a sum not more than one hundred dollars, nor less than thirty dollars. One half of the forfeiture would be distributed to the prosecuting "informant" and one-half would go to the federal government.

. . . ." Speech of President George Washington, 2d Cong., 2d Sess., November 6, 1792, 1 *American State Papers: Indian Affairs*, at 119. In response, Congress enacted the more stringent 1793 statute, to increase the law's effectiveness through additional enforcement mechanisms. There is no suggestion that Congress intended to subtract from the statutes' remedies. Accordingly, we agree with the district court that the private right of action that existed under the 1790 Act remained intact in the 1793 Act.

Our conclusion that Congress intended that private parties would have a cause of action to enforce the 1793 Act is further supported by other evidence of congressional intent. For example, in 1822 Congress amended the Trade and Intercourse Act of 1802—which essentially continued the 1793 Act's land alienation provision—to place the burden of proof on white persons in all cases in which Indians were parties. 3 Stat. 683 (1822). This pertained to "all trials about the right of property in which Indians shall be party on one side, and white persons on the other." *Id.* This provision only makes sense if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants.

Furthermore, the 1793 Act's misdemeanor provison only appears to apply to "negotiators" of Indian land cession transactions. The State, rather than Counties, thus would appear to be subject to the criminal penalties of the statute. *Cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). Without the availability of a private right of action against the Counties the only remedy would be the executive's discre-

tionary removal of violators.[14] Presidential authority to remove intruders even when exercised, however, often proved ineffectual. *American Indian Policy* at 158-66. Thus, absent a right of action, the Oneidas would have a right under a statute that was unenforceable. For all these reasons, we conclude that Congress intended that Indian litigants could bring private suits to enforce the 1793 Act's prohibition of certain land cessions.[15]

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[14] *Cf. Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968):

> [T]he general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment. Furthermore, the Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." H.R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that Indian's right to sue should not depend on the good judgment or zeal of a government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue under the oil and gas lease.

(footnote omitted).

[15] The only remnants of legislative history available indicate that President Washington, who was the moving force behind the 1790 and 1793 Acts, thought that they permitted the Indians to bring private causes of action. Complainter, Chief of the Seneca Indians, another tribe of the Six Nations, had met with President Washington in December 1790 to present their complaints about certain land transactions entered into during the prior decade. *American State Papers*, I *Indian Affairs* 139 (1834). Washington assured Complainter that at least after 1790, "the case [was] entirely altered; . . . any treaty formed and held without [the federal government's] authority [was] not binding." *Id.* Moreover, "[i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." *Id.* This speech was printed and communicated to Congress on January 11, 1792. *Id.* 142-43. Congress, therefore, was made aware of President Washington's perception of the reach of Indian law.

(3) *Statutory Purpose.*

The purposes of the 1793 Trade and Intercourse Act are best served by the implication of a private right of action. "[A] major purpose of the Acts as they developed was to protect the rights of Indians to their properties." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979). *See also U.S. v. Southern Pacific Transportation Co.*, 543 F.2d 676, 697 (9th Cir. 1976) (the statute was meant to "prevent the steady diminution of Indian territory . . . unless . . . by public treaty."). The Supreme Court has stated that it is "decidedly receptive" to the implication of a "private remedy [that] is necessary or at least helpful to the accomplishment of the statutory purpose . . . ." *Cannon v. University of Chicago*, 441 U.S. at 703. A private right of action is necessary in view of the virtually complete failure of other statutory remedies to provide the Indians with any real protection. *See United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); *American Indian Policy* at 147, 158-66.

(4) *Federal or State Concern.*

As stated above the Indians have a federal common law possessory cause of action. Moreover, it is well settled that laws affecting the Indians are principally the province of federal, not state law. *See, e.g., Oneida Indian Nation*, 414 U.S. at 669; *Hughes v. Washington*, 389 U.S. 290, 292-93 (1967); *Board of Commissioners v. United States*, 308 U.S. 343, 350-51 (1939); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Thus, all four prongs of the *Cort v. Ash* test have been met. Accordingly, we hold that the Oneidas had a private

right of action to enforce the Trade and Intercourse Act of 1793. We now turn to defendant's other arguments.

Abatement of the Cause of Action.

The Counties argue that even if the Oneidas could have brought suit under the 1793 Act, that cause of action has since abated. The 1793 Act expired after "two years, and from thence to the end of the then next session of Congress . . ." 1 Stat. at 332. Appellants assert, quoting *The General Pinkney*, 9 U.S. 5 (Cranch) 281, 283 (1809), that after the termination of the 1793 Act, "no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force unless some special provision be made for that purpose by statute." We disagree. The pertinent provision of the 1793 Act remains operative. 25 U.S.C. § 177 (1983) states that "[n]o purchase . . . of lands . . . from any Indian nation or tribe of Indians shall be of any validity . . . unless same be made by treaty . . . under the authority of the United States." Under these circumstances, "the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption." *Great Northern Ry. Co. v. United States*, 155 F. 945, 948 (8th Cir. 1907). Abatement is inapplicable according to this proposition because the underlying rationale of abatement is inapposite. Abatement "[i]mputes to Congress an intention to avoid inflicting punishment at a time when it would no longer further any legislative purpose. . . ." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). Because the 1793 statute remains essentially in force in 25 U.S.C. § 177, the continued invalidity of the illegal transactions would "further a legislative purpose," namely, protection of Indian land title.

Miscellaneous Objections to Liability.

Appellants raise three other arguments against liability: the statute of limitations, non-justiciability, and subsequent federal ratification of the 1795 transaction.

(1) *Statute of Limitations.*

Appellants claim that this suit, instituted 175 years after the cause of action accrued is time-barred. We disagree. State statutes of limitation are inapplicable. As we recently emphasized, in cases involving Indian land claims "[d]efenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected." *Mohegan Tribe v. State of Connecticut*, 638 F.2d at 614-15 & n.3. Moreover, state statutes of limitation are not borrowed "if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). Applying New York's statute would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts. In addition, we have recently rejected the assertion that such actions are time-barred noting that "[i]t is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses. It would be anomalous to allow the trustee to sue under more favorable conditions that those afforded the tribes themselves." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083-84 (2d Cir. 1982) (citation omitted).

Suits brought by the United States on behalf of Indian tribes are governed by the special statute of limitations set forth in 28 U.S.C. § 2415 which provides some guidance in the present situation. Under section 2415(c) there is no

time limitation if the action is to "establish the title to, or right of possession of, real or personal property." Section 2415(a) provides that actions in contract seeking money damages that accrued prior to July 1966 are timely if filed prior to December 31, 1982. Thus, had the United States brought the instant suit in 1970 instead of the Oneidas, it would not have been time-barred. We conclude that "at the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States." *Id.* at 1084

(2) *Justiciability.*

Appellants advance several reasons in support of their assertion that the Oneidas' claims present non-justiciable political questions:

(1) determination of the lawfulness of and remedy for the Counties' occupancy has been committed to the President;

(2) determination of the Plaintiffs' claim entails a choice among contenders for the right to govern the area covered by the 1795 conveyance;

(3) determination of the Plaintiffs' claim entails the allocation of tribal property, which is committed to Congress;

(4) determination of these questions by a federal court entails the risk of multifarious pronouncements on the foregoing questions by the different branches of the federal government.

Our holding that the Oneidas have a federal common law cause of action and an action to enforce the 1793 Trade and Intercourse Act negates defendants' argument

that the exclusive remedy against illegal occupiers is committed to the President. *Accord, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass, 1977); *Schaghticoke v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976).

The Counties' next two propositions also must be rejected. They assert that the effect of the district court's decision is to transfer the sovereignty of over 100,000 acres of New York State land "to at least three tribal factions who are, and who have been for years, feuding over which is the proper government tribe." This, they assert, is an issue "on which the district court must defer 'to the political departments.'" *Id.*, quoting, *Baker v. Carr*, 369 U.S. 186, 215 (1962).

The district court found that the three plaintiffs were the direct descendants of the Oneida Indian Nation that inhabited the land in question in 1795. 434 F. Supp. at 532. Judge Port based this decision on expert testimony, implicit United States' verification stemming from annuity payments, and recognition by the Bureau of Indian Affairs. *Id.* at 532-33. Appellants have given us no reason to disturb this finding. Hence, there is no need to intrude on internal tribal governance; moreover, the appropriate allocation of damages amongst the plaintiffs is not a

question that is presently before us on appeal."[18] Furthermore, as we observed in *Oneida Indian Nation v. New York*, "[t]o our knowledge no Indian land claim has ever been dismissed on non-justiciability grounds." 691 F.2d at 1081.

Finally, the Counties assert that our holding will have catastrophic ramifications. We rejected this argument in *Oneida Indian Nation v. New York*, in which we stated "we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed." *Id.* at 1083; *see generally id.*

(3) *Subsequent Federal Ratification.*

The Counties assert as a third defense to liability that the United States subsequently ratified the 1795 transaction in two federally approved treaties between the Oneidas and the State. The Treaty of June 1, 1798, describes the 1795 transaction as a "purchase." It also provides in relevant part:

> The said [Oneida] Indians do cede, release, and quitclaim to the people of the State of New York, forever, all the lands within their reservation, to the westward and southwestward of a line from the northeastern corner of the lot No. 54, *in the last purchase from them* running northerly to a button wood tree, . . . standing on the bank of the Oneida lake[.]

Treaty of 1798 (emphasis added). The "last purchase" referred to in this treaty, the parties agree, was the 1795

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[18] *See* 434 F. Supp. at 538 n.20 ("Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day").

transaction. The federally approved Treaty of June 4, 1802 also mentions lands "heretofore ceded . . . to the State of New York," ostensibly a reference to the 1795 purchase. In addition, both treaties refer to lots 54 and 59 which were part of the 1795 transaction.

We agree with the district court which cited *United States v. Santa Fe Pacific* in its holding that the reference in these treaties were not a "plain and unambiguous" ratification of the 1795 transaction. In *United States v. Santa Fe Pacific*, the Supreme Court refused to find that an ambiguous congressional pronouncement had acted to extinguish Indian land title. In so doing, the Court stated that " '[u]nquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' " 314 U.S. at 345, quoting *Cramer v. United States*, 261 U.S. 219, 227 (1923). Extinguishment of the Indians' title could not be "lightly implied" because "[c]ertainly, it would take plain and unambiguous action to deprive the Walapais [Indian tribe] of the benefits of that policy." *Id.* at 346, 354.

In arguing that the "plain and unambiguous" standard is inapplicable, the Counties attempt to distinguish the claimed ratification herein from the extinguishment of Indian title involved in *United States v. Santa Fe Pacific*. The distinction, however, is a meaningless one. Ratification also would serve to extinguish the Oneidas' title. We find the Counties' argument wanting for a second reason. Even under the standard propounded by the Counties it cannot be said that isolated references to land boundaries in the 1788 or 1802 treaties, which are little more than "metes and bounds" descriptions, are sufficient to constitute ratification of the 1795 transaction. Moreover, neither treaty makes any reference to the validity of the

underlying 1795 "purchase." There is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale.

II.

DAMAGES

After a separate trial on the issue of damages, Judge Port on October 5, 1981 awarded the Oneidas $9,060 plus interest against Madison County, and $7,634 plus interest against Oneida County for their unlawful use and occupation of the Oneidas' land for the years 1968 and 1969.[17] Judge Port arrived at these amounts by calculating the fair rental value of the land as unimproved for the years 1968 and 1969. Against those amounts he allowed the Counties a set-off for improvements because they occupied the land in good faith, and without knowledge of the unlawfulness of their continued occupation.

The appellants raise three issues regarding Judge Port's decision. The first is whether the Counties as allegedly good faith occupiers of the Oneidas' land can be held liable in damages. The second issue concerns the district court's ruling that the Counties could set-off against the damages assessed the amount of improvements they made on the land. And the third question is whether the law of eminent domain is relevant to the calculation of damages.

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17 As we noted earlier, *see supra note 6*, the district court found a violation of the 1793 Trade and Intercourse Act, but appeared to resort to the common law in formulating a damage remedy. We understand the district court to have examined the common law only to assist it in formulating a statutory damage remedy.

A. *Availability of a Damage Remedy.*

The Counties claim first that they did not violate the 1793 Trade and Intercourse Act, and second that if they did, the Act explicitly provides the exclusive remedies for its violation. They note that it was the state that violated the 1793 Act in 1795 and not the Counties,[18] which were subsequent occupiers of the land.[19] Even bad faith occupation would not violate the Act, the Counties assert, because section 8 regulates the disposition, not the occupation of Indian land. The Counties also contend that, in any event, they are good faith occupiers, and that the 1793 Act was not intended to assess damages against those holding land in good faith.

The Counties, however, do not question Judge Port's holding that the 1795 transfer of Indian land was void.[20] In effect the Counties have asked us to find that their good faith occupation of Oneida land can act as a subsequent validation of the 1795 transaction. To accept the Counties' argument, however, would render the Trade and Intercourse Acts wholly ineffective.[21]

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18 Oneida County was established in 1798 and Madison County in 1806. J. Lomenzo, *Manual for the Use of the Legislature of the State of New York* 310 (1938 ed.).

19 The district court was not able to ascertain when the Counties began their occupation of the Oneidas land, determining only that it was sometime in the 1800's.

20 Moreover, Judge Port's determination was amply supported. *See* 434 F. Supp. at 537-40

21 When Congress intended a provision in the same statute to contain an intent or good faith element it simply did so expressly. *See* § 6, 1 Stat. at 330 ("every person, who shall purchase a horse, knowing him to be brought out of Indian territory, by any person or persons not licensed, as above, to purchase the same shall forfeit the value of such horse.").

As we previously stated, the Oneidas are entitled to enforce the Nonintercourse Act's voiding of the 1795 purchase. This is what the Oneidas' lawsuit seeks to do. Their suit closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession. *See New York v. White*, 528 F.2d 336, 338 (2d Cir. 1975); *see also Taylor v. Anderson*, 234 U.S. 74 (1914). The Oneidas' claim is based on their present right of possession, *see Oneida Indian Nation*, 414 U.S. at 666, and the Counties' liability is premised on their continued occupancy of Oneida land in violation of the Act. Under the common law the good or bad faith of the occupant is irrelevant to his liability. *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 80-81 (1823); *Miceli v. Riley*, 436 N.Y.S.2d 72, 74-75, 79 A.D.2d 165 (1981). The Counties' occupation, regardless of their good or bad faith, of Indian land obtained in a transaction that violated the 1793 Act renders them liable.

The Counties also contend, however, that if their possession does violate the Act, the only remedies for their violation are expressly set out in the statute. *See supra* note 10. It follows from our conclusion that the Oneidas have a private cause of action that Congress intended the concomitant damage remedy that flows with it to be available; it is a "customary legal incident" of the private action. *See Transamerica*, 444 U.S. at 19. The Counties' conclusory statement that the statute provides the exclusive remedies for its violation, without citation to any legislative history, ignores the Supreme Court's repeated admonitions: "The creation of one explicit mode of enforcement is not dispositive of congressional intent with respect ot other complementary remedies." *California v. Sierra Club*, 451 U.S. at 295 n.6, citing *Transamerica*, 444 U.S. at 29 n.6 (White, *J.*, dissenting); *Cort*

v. Ash, 422 U.S. at 82-83 n.14. Accordingly, we agree with Judge Port that the Counties are responsible for the continuing violation of the 1793 Act and are liable in damages for that violation.

B. *Improvements' Set-Off.*

Since the Counties assumed possession of the Oneidas' land they have erected or completed several improvements on the land. They asserted, and the district court held, that the Counties were entitled to a set-off of the value of these improvements against the Oneidas' fair rental value damages. The improvements on the 871.92 total acres were: 809 acres used as highways; the 47.22 acre Champlain Battleground Park; a 2.07 acre parcel used as a fire department radio tower and a 13.13 acre gravel bed. To arrive at the rental value less improvements the court simply calculated the fair rental value of the land as unimproved.

Neither party appears to question Judge Port's fair rental value method of calculating damages.[22] Thus, the only dispute is whether the district court could set-off the value of improvements against the fair rental value damages. The court applied the common law rule that a good-faith occupier of land is entitled to a set-off for improvements. *See Green v. Biddle*, 21 U.S. (8 Wheat.) at 59; *see also Miceli v. Riley*, 436 N.Y.S.2d at 74; *Berney v. Brodie*, 272 N.Y.S.2d 881, 26 A.D.2d 679 (1966); 42 C.J.S. Improvements § 7 at 432 (1944). The Oneidas argue first that the common law rule should not be applied because it would frustrate the purposes of the 1793 Act by rewarding trespassers and encouraging unlawful alienations and occupations. We disagree. Presumably, the common law rule is based on the premise that to require forfeiture by the good-faith occupier of the value of its improvements would work an injustice and provide little in the way of added deterrence. A contrary rule would not discourage good faith trespassers from their illegal occupation because it is based on a mistaken, though still wrongful, belief of ownership. We are not prepared to require the good faith non-active wrongdoer, here a political subdivision, to forego the value of improvements it made in the absence of any policy benefits. If good faith occupiers were not credited with the value of their improvements, this would lead to the anomalous result that they usually would suffer higher damages than bad faith occupiers because good-faith occupants are more likely to make improvements.

[22] *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917); *New Orleans v. Gaines*, 82 U.S. (15 Wall.) 624 (1872).

The Oneidas next question the district court's finding that the Counties held the land in good faith. We find this issue more troublesome. The burden of proving good faith, rests on the Counties. *See, e.g., United States v. Wilson*, 523 F. Supp. 874, 900-901 (N.D. Iowa 1981); *Deakyne v. Lewes Anglers, Inc.*, 205 F. Supp. 415 (D. Del. 1962); *Church of God Prophecy v. Ferris*, 244 N.Y.S.2d 279, 281, 19 A.D.2d 934 (1963). The record does not show, however, whether the district judge placed the burden of proof on the Counties or on the Oneidas. Judge Port's opinion merely states that "there is no evidence to connect the defendants, these two Counties, with [the State's] act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 . . . ." At trial, however, the Counties only profferred evidence that they had been acting in good faith since 1970. Inasmuch as the Counties had possession of the Oneidas' land since sometime in the

1800's, it is not enough that they established good faith since 1970. On the basis of the present record, however, we are not prepared to overturn Judge Port's determination that the Counties had acted in good faith. We leave clarification of the issue of good faith to the district court on remand.

C. *Computing Damages at 90% of the Fair Rental Value.*

The Oneidas' last argument is that the lower court erred in calculating at less than 100% of the fair rental value certain lands through which highways presently run. Judge Port stated in his opinion:

> That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent domain could be applied here and do justice to the parties.

Judge Port then analogized the Oneidas' claim to a request for "just compensation" for a road easement condemnation, and calculated the fair rental of 90% of the value of the property. We cannot agree that such a discount is appropriate. It treats the Counties' occupation as if it were a lawfully obtained easement. We see no reason why there should be any diminution of the damages even if the uses were for a public purpose. Accordingly, on remand the district court should calculate damages without any discount.

III.

INDEMNIFICATION

The Counties filed third-party complaints against the State seeking indemnification of any damages assessed against them for their possession of the Oneidas' land. The State moved to dismiss the complaints, and the Counties cross-moved for summary judgment. Judge Port granted the Counties' motion over the State's objections that the court lacked subject matter jurisdiction, that the complaint failed to state a cause of action, and that the State's eleventh amendment immunity to suit barred the action.

A. *Subject Matter Jurisdiction*

The State maintains that the district court erred in holding that it had ancillary jurisdiction over the indemnity action, contending that the indemnity suit does not arise out of the same core of operative facts as the Oneidas' claim against the Counties. Any indemnity liability, the State argues, would stem from the State's disposition of the land to the Counties, and not from its acquisition of the land in violation of the Trade and Intercourse Act. We disagree. In order to establish their right to indemnity the Counties must show that they are compelled to pay monetary damages as a result of the State's wrongful conduct—here, New York's violation of the 1793 Act. *See Great American Ins. Co. v. United States*, 575 F.2d 1031, 1035 (2d Cir. 1978); *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 465 F. Supp. 790 (S.D.N.Y. 1978); *Taft v. Shaffer Trucking, Inc.*, 383 N.Y.S.2d 744, 52 A.D.2d 255 (1976). The Counties' indemnity claim, therefore, is based largely on

the same facts that established the Counties' liability. The Oneidas alleged and proved that the State had violated the 1793 Trade and Intercourse Act. Plaintiffs established, moreover, that the Counties were wrongfully occupying this land that had devolved from the State to the Counties. These same facts also establish the legal and equitable basis for the Counties' indemnity action. *See supra* section (II) (A). When the action for indemnification arises out of the same core of facts, the court's jurisdiction is "ancillary to its jurisdiction over the main action," *United States v. Farr & Co.*, 342 F.2d 383, 384 n.1 (2d Cir. 1965), and no independent basis for jurisdiction is necessary. *See* Fed. R. Civ. P. 14(a); *Agrashell, Inc. v. Bernard Sirotta Co.* 344 F.2d 583, 585 (2d Cir. 1965; *Dery v. Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); *Ayer v. General Dynamics Corp.*, 82 F.R.D. 115, 121 (S.D.N.Y. 1979); 3 J. Moore, Moore's Federal Practice § 14.26, at 14-108 & n.6 (1982).

B. *Failure to State a Cause of Action.*

We find no merit in the State's assertion that there is no cause of action for indemnity. "It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity.' Restatement, Restitution, § 76." *McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 260, 428 N.Y.S.2d 643, 646 (1980). Therefore, when "payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law." *Brown v. Rosenbaum*, 287 N.Y. 510, 518-19, 41 N.E.2d 77 (1942); *see also Dunn v. Uvalde*

Asphalt Paving Co., 175 N.Y. 214, 217-18, 67 N.E. 439 (1903); *Oceanic S.N. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 465-68, 31 N.E. 987 (1892); *City of Brooklyn v. Brooklyn City R.R. Co.*, 47 N.Y. 475, 486-87 (1872); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130, 147 (1932); Meriam & Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. Rev. 845 (1950).

C. *Eleventh Amendment Immunity.*

The State argues that the eleventh amendment is a bar to the Counties' claim against it. The amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

We agree with the district court that the eleventh amendment is not a bar to action against the State of New York. The State's acquisition of the Oneidas' land was in subordination to the power of Congress to legislate regarding Indian lands, pursuant to Article 1, Section 8 of the Constitution.[23] The 1790 and 1793 Acts of Congress placed New York on notice that Congress had exercised its power to regulate commerce with the Indians.[24] Thus,

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[23] "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192.

[24] Section 8 of the 1793 Act prohibited purchases of Indian lands not negotiated "under the authority of the United States." *See supra* note

anything New York thereafter did with respect to Indian lands carried with it a waiver of the State's eleventh amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Employees v. Missouri Public Health & Welfare Dept.*, 411 U.S. 279, 283-84 (1973).[8]

In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the state of Alabama owned and operated a railroad in interstate commerce. Alabama had commenced its railroad operation twenty years after the enactment of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). This Act permitted a railroad employee to sue his or her employer for personal injuries sustained in the course of employment. The Court found that Congress had conditioned operation of a railroad on acceptance of potential FELA liability and any damage suits arising therefrom; by starting the railroad after the FELA had been enacted, Alabama had constructively consented to a waiver of its immunity. 377 U.S. at 192; *see also County of Monroe v. State of Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983). The importance of the chronology in *Parden* became readily apparent after the Supreme Court's subsequent decisions in *Edelman* and *Employees*. Unlike *Parden*, "[i]n neither of those cases did the state have sufficient notice that it would be liable for damages if it participated in the

7. Similarly, section 4 of the 1790 Act stated "[t]hat no sale of lands made by Indians . . . shall be valid to any person or persons, or to any state . . . ."

8. The Supreme Court has not stated the necessity of proving state waiver of immunity in the fourteenth amendment context. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. at 456. By ratifying the fourteenth amendment after the eleventh amendment, the states can be said to have waived their immunity in all cases in which Congress exercises its enforcement power under section 5 of the fourteenth amendment.

federal programs." *County of Monroe*, 678 F.2d at 1134. In *Employees*, Missouri had been operating hospitals long before the 1966 amendment extended the coverage of the FELA to state employees. In *Edelman*, similarly, Illinois was faced with a federal statute that appeared to impose only the sanction of future funding curtailment, and not a damage suit for benefits wrongfully withheld. Neither Illinois nor Missouri thus had "sufficient notice that it would be liable for damages if it participated in the federal programs." *Id.* As a result, neither state had a "real option to discontinue its participation in the activities subject to federal regulation and forego the accompanying benefits." *Ibid.* The choice between terminating "vital public services" and waiving eleventh amendment immunity was "no true choice at all." *Employees*, 411 U.S. at 296 (Marshall, *J.*, concurring).

The instant case is analogous to *Parden*. The 1793 Act was enacted two years prior to the state's purchase of Oneida land. Thus, the State had adequate notice that it was subject to the statute's strictures. *See generally supra*. As the district court noted, on several occasions President Washington and Secretary Knox urged New York to comply with the 1793 Act. *See* 434 F. Supp. at 534-35. The state chose to ignore their admonitions. The State's proprietary purchase of Indian land thus was an act wholly outside "the sphere that is exclusively its own and enter[ed the state] into activities subject to congressional regulation . . . ." *Parden*, 377 U.S. at 196. The State's act, "with its 'eyes wide open,'" *County of Monroe*, 678 F.2d at 1134, quoting *Edelman*, 415 U.S. at 693 (Marshall, *J.*, dissenting), "subjects itself to that regulation as fully as if it were a private person or corporation." *Parden*, 377 U.S. at 196. Therefore, we agree with the district court's determination that New York impliedly

consented to a waiver of its eleventh amendment immunity.

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We affirm the judgment of the district court which held the Counties liable for illegal occupation of the Oneida land, and its judgment that the State of New York must indemnify the Counties for any damages assessed against them.

We remand for further proceedings to determine the good faith claims of the Counties as they bear on any set-off for improvements made on the property, and for recomputation of damages.

MESKILL, *Circuit Judge*, dissenting:

I respectfully dissent.

The implications of the majority's decision are far reaching and I believe that the decision is wrong. The present dispute involves 871.92 acres of land and a judgment for $16,694, plus interest, for two years' use thereof, not an unusually significant amount in and of itself. But the court does not specify any limiting principles in this area. I see nothing in the majority's opinion which, when coupled with our decision in *Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070 (2d Cir. 1982), would prevent the Oneida or any other tribe from suing for the full value of all land taken from them at any time during our nation's history in contravention of federal law—to say nothing of the possibility of bringing an action for ejectment. Courts should be reluctant to invite such potentially staggering claims on the skimpy authority relied on today by the majority.

This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting.[1] Today's decision is likely to interfere with rather than advance the federal government's policies towards Indians.

To decide that Indian land claims should be resolved by judicial fiat is not only unwise, it is also unnecessary. The Indian tribes have remedies available without resort to the federal courts. Congress has established administrative procedures to resolve Indian land claims and the federal government can sue in federal court to enforce Indian land rights.[2] If the existing federal administrative mechanism is ineffective, the Indians' proper remedy is not in the federal courts, but rather in Congress.

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1 The Indian tribes are considered sovereigns "which, by government structure, culture, and source of sovereignty, are in many ways foreign to the constitutional institutions of the Federal and State Governments." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 71 (1978); *see also Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-40 (1982); *United States* v. *Wheeler*, 435 U.S. 313, 322-23 (1978). Relations with Indian tribes can thus be analogized to relations with foreign nations. The Supreme Court has shown great reluctance to interfere with or take actions that might embarrass the federal political branches' conduct of foreign affairs, *see, e.g., Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion); *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 431-33 (1964); *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C.J.).

2 *See United States* v. *Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Cramer* v. *United States*, 261 U.S. 219 (1923).

I

The majority holds today that the Oneida may maintain a direct action to recover damages for wrongful occupancy. Despite the majority's claim to the contrary, this is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law.

From the outset of the Union, Indians were considered wards of the United States; the federal government assumed the role of their guardian. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 46 (1913); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, *C.J.*) ("[T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . ."); *cf. United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.").

From the special guardianship relation between the United States and the Indian tribes, it can be inferred that the Indians should be subject to liabilities under federal law only when Congress sets up a statutory scheme. This has long been settled law. *See, e.g., United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (reaffirming that tribal sovereign immunity is coextensive with that of the United States; "[t]hese Indian Nations are exempt from suit without Congressional authorization."). Similarly, it follows that their federal rights should also be based on specific congressional acts. Far from a leap of logic, this is equally settled law:

> The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians: *Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors. In all the cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit.* The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fullfillment of their obligations or the discharge of their duties.

Jaeger v. United States, 27 Ct. Cl. 278, 284-85 (1892) (emphasis supplied).[3]

Special statutes giving Indians the rights of suitors were necessary because it was inconceivable to lawmakers and judges in the era of early American common law that Indian tribes would resort to courts of law to enforce their legal rights. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17 (Marshall, *C.J.*) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a

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3 *See Karrahoo v. Adams*, 14 F. Cas. 134 (C.C.D. Kan. 1870) (Federal circuit court had no jurisdiction in a case involving a non-citizen Indian whose complaint did not raise a federal question).

redress of wrong, had perhaps never entered the mind of an Indian or of his tribe."). Thus, viewed from a common law perspective, it is apparent that there never existed a federal common law private cause of action for damages.

Assuming *arguendo* that a federal common law cause of action in favor of the Indians existed, it was preempted by the Trade and Intercourse Acts.

When Congress addresses directly and comprehensively a question previously governed by federal or state common law, that common law is preempted. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). While the majority does not dispute this, it finds that Congress did not intend to preempt the field because the Trade and Intercourse Acts were not comprehensive statutes. This explanation ignores existing Supreme Court case law on preemption and improperly addresses the issue of congressional intent.

The majority points out that the Acts "did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment."[4] But Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Supreme Court held a Pennsylvania alien registration statute invalid under the Supremacy Clause partly because the state statute interfered with the federal scheme of registration, even though the state and federal statutes were not explicitly contradictory and there was no express congressional intent to override state legislation. The Court noted that "[e]xperience has shown that international controversies

[4] It is not surprising that the Act did not expressly refer to an "existing" federal common law right. Of all the cases cited by the majority to indicate the existence of such a cause of action, *not one* was decided before 1793.

of the greatest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." 312 U.S. at 64. The Court thus reasoned that state law which potentially conflicted with federal law in this sensitive area had to fall because the federal government was the agent of foreign policy in our country and, as the agent, it had determined that a particular scheme of registration was necessary in order to avoid friction with other nations.

The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to reassure Indians who had grown "restive." This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statutes at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981). *See Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

The majority also tries to determine whether the early congressional scheme was comprehensive from a late twentieth century perspective. But, we must remember that it is the intent of the 2nd Congress which we search for here, not the perceived views of a Congress elected

many years later. It is true that the 1790 and 1793 Acts were not comprehensive by today's standards, but they did proscribe certain acts and provide civil and criminal sanctions. Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated.

The majority's reliance on the language in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941), is inappropriate, inasmuch as that case involved a mid-19th century statute which allegedly abolished the Indians' aboriginal rights. There, the Supreme Court was talking about the extinguishment of undisputed title to land, not the preemption of a questionable right of a ward to a private cause of action.

II

The majority states that the Nonintercourse Acts were passed to protect Indian tribes and determines, on the basis of the language cited in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-75 (1982), that when a statute is enacted in order to benefit a special class of beneficiaries, the judiciary will normally recognize a remedy for class members if the statute was passed prior to *Cort* v. *Ash*, 422 U.S. 66 (1975). Therefore, reasons the majority, when Congress passed the aforementioned Acts it must have intended that the beneficiaries would be able to enforce their rights by a private action. While superficially appealing, this argument lacks the support of either precedent or legislative history. *Merrill Lynch* does not address the question whether a private cause of action should be implied where Congress has explicitly granted the federal government the power

to sue to protect the rights of the particular group benefited by the statute.

The majority is correct that the Acts were passed in order to protect Indian tribes. However, it takes a great leap of logic to suppose that the Congresses that passed the Acts intended the Indian tribes to have a private cause of action for violations of these Acts. It is difficult to believe that at that time Congress would have left it to the courts to imply such a significant and far reaching remedy, particularly when we remember that the Acts were passed in order to avoid war with the Indian tribes. Obviously Congress never intended the remedy to be available.

I believe that the lower courts that have assumed a private cause of action for a violation of the Acts, *see, e.g.*, *Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 805 & n.3 (D.R.I. 1976), are in error. They use neither legislative history nor valid precedent[1] to support their position.

Similarly, the need for private enforcement because of poor government performance in this area should not affect the outcome here. The government's failure to enforce Indian rights vigorously provides a strong argument for the need for private enforcement. That argument should be made to Congress, however. We should not perform a legislative function. Furthermore, when

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1 These cases all rest upon decisions that recognized a private right of action to Indians when the United States had the power to sue on the same cause of action and to seek the same relief. They do not support the proposition that if the government has a statutorily based power to pursue a remedy, the Indians may bring their own action for a different remedy that does not arise out of the same statute.

construing a statute passed in the late 18th century, we should not consider events which transpired, or failed to transpire, in the subsequent 200 years in order to shed light on congressional intent.

The majority states that even under traditional *Cort* v. *Ash*, 422 U.S. 66 (1975), criteria, a private cause of action may be maintained. I believe the opposite conclusion to be the case here.

This case does not satisfy the second prong of the *Cort* test, namely, whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78. I believe that congressional silence on this question indicates a desire not to include a private cause of action as a remedy.

The majority states that Congress intended in the 1793 Act to provide "maximum protection" to Indian land. Assuming this to be true, Congress probably never believed private action necessary in order to accomplish maximum protection. The Act provided for criminal sanctions for violations and included a provision authorizing the executive branch to remove violators from Indian land.[4] These sanctions if utilized would appear to be full and adequate remedies for the conduct that Congress wished to proscribe. Furthermore, it would have been an easy matter for Congress to provide for a private cause of action in favor of Indian tribes or to expressly continue an existing common law remedy if one existed. The failure to do so indicates to me that Congress either did not wish to enact such a remedy or that it never considered the issue. Either explanation would produce the same result—no private cause of action was intended.

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4 *See* Majority op. n.12.

The court's reference to *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979), is inappropriate. There, the Court dealt with a statute, section 215 of the Investment Advisers Act of 1940, that only declared certain contracts void. Neither sanctions, nor remedies, nor any mechanism for voiding contracts were explicitly provided. By contrast, the 1790 Act, *as amended* by the Act of 1793, *did* explicitly provide sanctions and an enforcement mechanism. Indeed, these later enforcement provisions were included *because* the 1790 Act lacked them.

By contrast, the instant dispute is analogous to the claim in *Transamerica* for a private cause of action under section 206 of the Investment Advisers Act. Congress expressly provided judicial and administrative means to enforce section 206 rights, including criminal penalties and authorization to the SEC to enjoin compliance with the Act. 444 U.S. at 20. The Court stated that "[i]n view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* (citation omitted). As the Supreme Court noted, "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Id.* at 19-20 (citation omitted).

The same reasoning is applicable to the present case. Because Congress explicitly provided for remedies and sanctions in the 1793 Act, it is "highly improbable" that it forgot to include a private cause of action. This is particularly true in view of the importance that Congress

and the President placed on the matter of Indian affairs in the 1790s.

The majority's characterization of the 1822 Act is not convincing. The provision in the 1822 Act referring to Indians as parties does not only make sense, as the majority claims, "if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants." This provision also applies to a suit in which the government seeks to enforce Indians' rights on their behalf. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In such a case, the Indians in question would be the real parties in interest. Congress could have been indicating that in this type of action the burden of proof would not be on the government as plaintiff-guardian.

In sum, I believe there is no basis upon which the majority can imply a private cause of action by Indians to recover damages for wrongful possession. To hold otherwise is a novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.

I would reverse and remand with directions to dismiss the complaint.

PETITIONER'S

BRIEF

No. 83-1240
No. 83-1065

FILED
JUN 15 1984
ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Petitioners,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief for the State of New York, Petitioner in No. 83-1240

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Questions Presented.

1. Whether an Indian Tribe enjoys a private right of action under the federal common law or pursuant to the Trade and Intercourse Act of 1793 to recover damages for the use and occupation of lands allegedly obtained from said Indian Tribe in violation of the Trade and Intercourse Act of 1793.

2. Whether, in any event, the courts should have declined to entertain this action because the "political question" doctrine is directly applicable to this case.

3. Whether the applicable statute of limitations is a bar to the present action, which was commenced 175 years after the cause of action accrued.

4. Whether the 1795 conveyance by the Oneida Indians to the State of New York was subsequently ratified by the United States and is therefore valid and enforceable.

5. Whether, since the federal courts would lack jurisdiction over the State in an original action brought against the State by the Counties because of the State's sovereign immunity, the courts also lack ancillary jurisdiction over the same issues.

6. Whether a State by negotiating treaties with an Indian Tribe in alleged violation of the Trade and Intercourse Act of 1793 may be held to have waived impliedly its immunity to suit in federal court by non-Indian claimants, the only claimants against the State involved here.

7. Whether, assuming the existence of federal jurisdiction to hear the Counties' claims, substantive New York law would permit the imposition of an award against the State in an amount other than that specifically provided by the New York law of real property.

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No. 83-1240
No. 83-1065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Petitioners,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the State of New York, Petitioner in No. 83-1240.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 719 F2d 525 (2d Cir. 1983) and is reprinted at pages 207a-258a of the Joint Appendix ("JA 207a-258a"). Three decisions were rendered by the District Court for the Northern District of New York (Edmund, Port, D.J.), dated respectively July 12, 1977, October 5, 1981 and May 5, 1982. The decision and order dated July 12, 1977 is reported at 434 F Supp 527 (NDNY, 1977) and is reprinted at JA 45a-86a. The unreported decision dated October 5, 1981 is set forth at JA 154a-175a. The unreported decision dated May 5, 1982, which was dictated from the bench, is set forth at JA 188a-199a.

Jurisdiction.

The opinion of the United States Court of Appeals was filed on September 29, 1983. By order filed March 19, 1984, this Court granted New York's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, and consolidated the case with case no. 83-1065, *County of Oneida, New York, et al. v. Oneida Indian Nation of New York State, etc., et al.* This Court's jurisdiction to review the case rests upon 28 USC § 1254(1).

Constitutional and Statutory Provisions Involved.

United States Constitution, Article I, section 8; Article III; The Tenth Amendment; The Eleventh Amendment; and the Trade and Intercourse Act of 1793 are set forth in pertinent part in the appendix to this brief.

Statement of the Case.

This action was commenced in February, 1970, by the Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin ("Oneida Indians") against the County of Oneida, New York and the County of Madison, New York (JA 4a-10a).* The action, which was specifically brought as a "test case", seeks damages for the use and occupation of approximately 872 acres of land during the years 1968 and 1969 which lands were secured through a chain of title commencing with patents issued by the State of New York. In that action, it was contended that the State of New York did not have title and could not transfer the lands because it had obtained the lands by treaty with the Oneida Indians in 1795 (JA 31a-35a) which was allegedly in violation of the Trade and Intercourse Act of 1793 (3a).**

In an unpublished opinion rendered on November 11, 1971, the District Court dismissed the claim for lack of federal question jurisdiction. The Court of Appeals affirmed, 464 F2d 916 (2d Cir, 1972), and this Court, in an opinion reported at 414 US 661 (1974) reversed and remanded, holding that, "for jurisdictional purposes", 414

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*The Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin are separate entities, the former allegedly having a situs in the Counties of Oneida and Madison, New York, and the latter in the State of Wisconsin. The third plaintiff, the Oneida of the Thames Band Council, was permitted to intervene during the liability phase of the action; it has as its situs Ontario, Canada.

**The significance of this litigation can be placed somewhat in perspective when it is borne in mind that by the 1785 Treaty the Oneidas transferred to the State of New York approximately 100,000 acres of land. Hence, even beyond its precedential effect, the direct consequences of this action are far vaster than its immediate holding would indicate.

US at 673, the complaint sufficiently stated a controversy arising under the Constitution, laws, or treaties of the United States. The Court did not rule on the issue of whether substantive federal law in fact provided the Oneidas with a right of action.

Following remand, the Counties filed third-party complaints against the State of New York seeking judgment against the State for any amounts recovered against them by the original plaintiffs (JA 18a-20a, 21a-22a). The case was then trifurcated by the District Court.

By decision and order dated July 12, 1977 (JA 45a-86a), the District Court ruled that the Counties were liable to the plaintiffs for wrongful possession of the plaintiffs' land.* On October 5, 1981, following a trial on the issues of damages, the District Court entered a judgment against the Counties in favor of the plaintiffs in the following sums (JA 178a):

Against Madison County $[illegible], plus interest

Against Oneida County $7,634.00, plus interest

*In ruling on the issue of liability, the District Court acknowledged at outset that the reach of the Oneidas' claim fell "far beyond the boundaries of the present suit" (JA 47a), and noted that the "potential for disruption in the real estate market is obvious and is already being felt" (JA 48a). In view of the fact that the court's decision, and the judgment of affirmance by the Court of Appeals, implicitly holds that thousands of individuals and entities within the area of the Oneidas' claim are now trespassers, there are truly embarrassments. As was noted by the Court of Appeals in its affirmance (JA 213a), between the years 1795 and 1846, the Oneidas entered into 23 additional treaties with the State of New York, only two of which "were made with federal supervision and approval". Indeed, the catastrophic nature of the ruling below was highlighted by the Court of Appeals when it observed in a *footnote (id.)* that one authority has "estimated that the State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government' ". Quoting from F. Cohen, *Handbook of Federal Indian Law*, p 420, n 24 (1945 ed).

The State of New York moved for an order pursuant to Rule 12(b)(1)(2)(6) of the Federal Rules of Civil Procedure dismissing the third-party complaints for (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, and (3) failure to state a claim upon which relief can be granted (JA 182a-183a). The Counties cross-moved for summary judgment (JA 184a-187a).

By decision and order dated May 5, 1982, the District Court denied the State's motion and granted the Counties' motion (JA 188a-201a). A final judgment in favor of the Counties and against the State was entered on May 19, 1982 (JA 202a-203a).

All three parties appealed to the United States Court of Appeals for the Second Circuit. On September 29, 1983, the Court of Appeals, over a strong dissent by Circuit Judge Meskill, affirmed both the judgment of the District Court holding the Counties liable for illegal occupation of the plaintiffs' land and its judgment that the State of New York must indemnify the Counties for any damages assessed against them (JA 248a). The matter was remanded for further proceedings relating to the issue of damages.

In ruling as it did, the Court of Appeals held, *inter alia*, that at the time of the 1795 purchase of their land by the State of New York, the Oneida Indians enjoyed a federal common law right of action for occupancy and use of their lands and that such common law right of action had not been preempted by the Trade and Intercourse Act of 1793 (JA 215a-219a). The court held additionally that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State (JA 243a-244a);

that the State, in purchasing the Oneidas' land, had impliedly waived its Eleventh Amendment immunity to suit (JA 245a-248a); and that under New York law, the Counties were entitled to be indemnified by the State for any damages assessed against them (JA 244a-245a). In a dissenting opinion (JA 248a-258a), Circuit Judge Meskill stated that he would reverse and remand with directions to dismiss the complaint upon the ground that an Indian Tribe does not possess a private cause of action to recover damages for wrongful possession under either the Trade and Intercourse Act or pursuant to federal common law.*

Summary of Argument.

I. The conclusion reached by the Court of Appeals that the plaintiffs, in 1795, possessed a federal common law right of action to recover damages for wrongful occupancy and use of their lands is not supported by the case law and no such right of action should be inferred. Even if such a right of action existed prior to 1793, it was preempted by the Trade and Intercourse Act, which comprehensively addressed the issue of trade and intercourse with the Indians, and which, from 1793 onward, enunciated in detail both the conduct which was proscribed and a mechanism for the law's enforcement. Moreover, nothing is contained in either the language of the Trade and Intercourse Act of 1793, or in its legislative history, which supports in the slightest the proposition that in enacting the Trade and Intercourse Act, the Congress intended the Indian tribes to have a private right of action based upon its violation.

*In his dissent, Judge Meskill pointed to the "potentially staggering claims" which the majority's decision could engender (JA 248a), and observed that the problem was essentially a political one, requiring "a comprehensive solution that the judiciary cannot provide in one sitting" (JA 249a).

II. The Constitution of the United States commits to the Congress responsibility for the regulation of commerce with the Indian tribes. However, insofar as the instant controversy is concerned, Congress, through the Trade and Intercourse Act of 1793 and the Treaty with Six Nations (Treaty of Canandaigua), 7 Stat 44 (November 11, 1794), has explicitly delegated remedial discretion to the President. This militates strongly against the implication of a private right of action in favor of the Indians. It follows further that if any remedy is to be afforded the Oneidas for the alleged wrongful use and occupation of the subject lands by the Counties, such remedy cannot properly be fashioned by the courts unless it is at the behest of the President. The record in this case demonstrates that twice prior to the commencement of this action, the plaintiffs petitioned the President seeking the assistance of the United States in the prosecution of a claim against the State of New York. In the face of the President's decision not to prosecute such a claim, the courts below should properly have refused to entertain this lawsuit, implicating as it does a policy determination of a kind clearly not within the discretionary powers of a court to make and a political decision which has, in fact, already been made. Furthermore, if the lower courts' resolution of this matter did not actually express a lack of the respect due the political branches of government, it leaves open the possibility, should the Oneidas again petition the President, of embarrassment from various pronouncements by several departments on a single question. Additionally, in view of the chaos which would result from any judgment not wholly adverse to the plaintiffs, the application of the political question doctrine is fully warranted in this case.

III. Because there exists no federal limitations period which is expressly applicable to suits by Indian tribes to

recover damages for the wrongful use and occupation of their lands, the courts below should appropriately have applied the most analogous New York State statute of limitations in determining the timeliness of the Oneidas' action which was commenced 175 years after the cause of action accrued. Applying New York State's statute of limitation in this case would be neither inconsistent with the Trade and Intercourse Act, nor anomalous, but would be fully consonant with federal law.

IV. The United States may, by its subsequent actions, ratify, and thereby validate, transfers of land by Indian tribes which could otherwise be voided because of the Trade and Intercourse Acts. The language employed in the Treaties entered into by the Oneida Indian Nation and the State of New York on June 1, 1798 and June 4, 1802, both of which were conducted under federal supervision, demonstrate both an awareness and an approbation on the part of the United States of the 1795 transaction whereby the State of New York acquired the lands which are the subject of this action. The language contained in those Treaties constitutes a plain and unambiguous expression of federal ratification.

V. In ruling that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State, the Court of Appeals committed error in disregarding the constitutional impediment to the Counties' actions—the State's sovereign immunity. The cases relied upon by the Court of Appeals are inapposite since none of them deal with a State as a third-party defendant. Neither the convenience of the litigants nor considerations of judicial economy can serve to override the Constitution; neither should suffice to permit a suit against a non-consenting State where the State has not waived its

sovereign immunity and where no independent basis for jurisdiction exists. Even if it were assumed that the State's acts in dealing with the Oneidas would constitute a waiver of immunity insofar as the Oneidas are concerned, such a waiver should not be extended to the Counties' dealings with the State. The Counties' actions are actions for money damages as indemnity resulting from an alleged breach of implied warranties. The only forum where such an action may properly be brought is in the New York State Court of Claims.

VI. Although a sovereign's immunity may be waived, the mere fact that New York may have entered into a federally regulated sphere of activity in dealing with the Oneidas is insufficient to constitute a waiver of the State's sovereign immunity. And, there is especially no basis for implying a waiver with respect to the State's dealing with non-Indian third parties, the only type of parties suing the State here. The ultimate question before a court looking at an alleged implied waiver of the Tenth or Eleventh Amendments is whether Congress intended to require that waiver. Insofar as the Trade and Intercourse Acts are concerned, there is no evidence of a congressional intent to create a private right to sue a state in the federal courts. The acts of New York in securing possession of the subject lands were acts of a sovereign nature, and the State was not engaging in private enterprise. Moreover, the fact that the Trade and Intercourse Act gave remedial authority to the President, militates strongly against a remedy of waiver by the State. This is especially so here since the claimed waiver in this case relates not to suits by Indians, but solely to the cross-claims of the Counties.

VII. Because the Counties' actions against New York are essentially an attempt to imply a warranty of title for

the conveyance of real property by the State, the courts below should have looked to New York's law of real property in fashioning a remedy. The Counties' claims against the State are, at bottom, contract claims, and thus depend for their vitality on the demonstration of a contractual relationship to indemnify for failure of title either by express or implied covenant. However, since it is not alleged that the patents by which New York conveyed the subject lands contained any covenants, and since New York law does not recognize an implied warranty of title for real property, the only remedy available to the Counties is that provided for by section 6 of the New York State Public Lands Law, which was enacted specifically for this purpose.

ARGUMENT.

POINT I.

The Court of Appeals erred in holding that the counties were liable to the Oneidas.

A. The Oneidas do not have a cause of action against the Counties under federal law.

The conclusion reached by the Court of Appeals that the plaintiffs may maintain this direct action for damages against the current occupiers of the lands which are the subject of this lawsuit is premised upon two somewhat interdependent propositions. The court reasons first that the Oneidas, in 1795, possessed a federal common law right of action to recover damages for wrongful occupancy and use of their land which right of action was not preempted by the Trade and Intercourse Act of 1793 (JA 215a-219a).

Second, the court concludes that the Congress, in enacting the Trade and Intercourse Acts, had intended the Indians to have an implied private right of action to enforce its provisions (JA 219a-231a). We submit that the Court of Appeals is in error in both respects and that there should consequently be a reversal.

1. An Indian Tribe does not possess a private right of action under federal common law.

There can be no question but that, from the outset, the relationship between the United States and the indigenous Indian populations living within the boundaries of the nation has been one of guardian and ward. See, e.g., *United States v Sandoval*, 231 US 28, 46 (1913); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 17 (1831). It follows from this special relationship, and it has long been the law, that Indian tribes may be held subject to liabilities under the federal law only where Congress has explicitly so provided. See, *United States v United States Fidelity & Guaranty Co.*, 309 US 506 (1940); cf. *United States v Kagama*, 118 US 375 (1886). It should likewise follow, and it appears to be equally well settled, that any federal rights which an Indian tribe possesses must derive from specific congressional authority as well. This point was made by the Court of Claims in *Jaeger v United States*, 27 Ct Cl 278, 285 (1892):

> "The civil rights incident to States and individuals as recognized by what may be called the 'law of the land' have not been accorded either to Indian nations, tribes, or Indians. Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them

> the civil rights of suitors. In all cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit. The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fulfillment of their obligations or the discharge of their duties".

Since, in regard to damage actions for wrongful possession, Congressional authority is completely absent, no right of action should be inferred.

The Court of Appeals cites as authority for the proposition that an Indian tribe possesses a common law right of action for wrongful possession the cases of *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823), and *Marsh v Brooks*, 49 US (8 How) 223 (1850). However, these cases are inapposite. *Johnson v McIntosh, supra*, was a diversity action and involved a title dispute between non-Indians, the plaintiff claiming title to certain lands situated in the State and district of Illinois under a purchase and conveyance from the Piankeshaw Indians and the defendant claiming under a grant from the United States. *Marsh v Brooks, supra*, was a *state* law proceeding in the nature of an ejectment to recover certain lands situated on the right bank of the Mississippi River. Although the Court observed in *Marsh* that the right to maintain an action of ejectment "on an Indian right to occupancy and use [was] not open to question", 49 US at 232, citing to *Johnson v McIntosh, supra*, in *Marsh*, as in *Johnson v McIntosh*, the parties to the dispute were again non-Indians. Thus, while it may be conceded that the early common law recognized a right of action based upon Indian title, this is a far different thing from asserting, as does the court below, that such right of

action lay with the Indians. As was stated by Chief Justice Marshall in *Cherokee Nation v Georgia, supra*, 30 US (5 Pet) at p 18:

> "At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of a right or a redress of a wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, *and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.* • • •" (Emphasis supplied.)*

Even assuming that a Federal common law cause of action in favor of the Indians existed prior to 1793, such cause of action was preempted by the Trade and Intercourse Act of 1793.

It is settled law that when Congress directly and comprehensively addresses a question previously governed by federal common law, the common law is preempted. *Milwaukee v Illinois*, 451 US 304 (1981); *Middlesex County Sewerage Auth. v National Sea Clammers Assn.*, 453 US 1

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*Creek Nation v United States, 318 US 629 (1943), where this Court observed in dictum that Indian tribes had, in addition to a statutory right to sue, "a general legal right • • • to bring actions on their own behalf", 318 US at 640, does not lead to a contrary result. Aside from the fact that the statement relates to a later time frame, there is, we submit, a vast difference between asserting that an Indian tribe "may bring an action" and asserting that such tribe enjoyed the right to bring a federal common law action for wrongful possession in the federal courts, and that such right of action, if it existed at all, survived the passage of the Trade and Intercourse Acts. And compare *Creek Nation v United States, supra*, with *Felix v Patrick*, 145 US 317 (1892).

(1981). The Court of Appeals, while acknowledging this to be the law, nevertheless concluded that the Trade and Intercourse Acts did not preempt any common law right of action possessed by the Indians because (JA 218a):

> "[t]he Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. • • • There is no evidence to suggest that Congress intended to deny common law remedies to the Indians.• • •"

That the Trade and Intercourse Acts did not "speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment", however, does not support the court's conclusion that the Act was not preemptive or that the Congress did not intend to deny common law remedies to the Indians. Whatever might have been the case prior to the passage of the Trade and Intercourse Act of 1793, thereafter a comprehensive pronouncement* dealing fully with the broad issue of trade and intercourse with the Indians and enunciating in detail both the conduct which was proscribed

*The Trade and Intercourse Act of 1793 is at least as comprehensive as certain other enactments found by this Court to be preemptive of common law. In *Mobil Oil Corp. v Higginbotham*, 436 US 618 (1978), for example, the Court held that the Death on the High Seas Act, 46 USC, §§ 761-768, a statute containing only eight sections, preempted federal common law in admiralty. And compare *Northwest Airlines, Inc. v Transport Workers Union*, 451 US 77 (1981), where this Court held that the Equal Pay Act, which comprised only one subsection of the Fair Labor Standards Act, 29 USC, § 206(d), and Title VII of the Civil Rights Act of 1964, 42 USC, §§ 2000e, *et seq.*, containing 17 sections, foreclosed the creation of a federal common law remedy in favor of the petitioner notwithstanding "a favorable reaction to the equitable considerations supporting petitioner's • • • claim". 451 US at 98.

and a mechanism for the law's enforcement was firmly in place. Moreover, as this Court observed in *Northwest Airlines, Inc. v Transport Workers Union*, 451 US 77, 97 (1981):

> "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme *including an integrated system of procedures for enforcement*. • • •" (Emphasis supplied.)

The Trade and Intercourse Act of 1793 is such a statute.

An examination of the relevant statutory language bears this point out. Section 1 of the Trade and Intercourse Act of 1793 provided that no person "shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose" (3a).* It required a bond "in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes" *(id.)*. Section 2 authorized the person issuing the license "to recall the same, if the person so licensed shall transgress any of the regulations or restrictions • • • and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained" (3a). Section 3 provided that persons attempting to trade with Indian tribes or found in Indian country without such a license "shall forfeit all the merchandise offered for sale to the Indians, or found in his possession • • • and shall,

*References followed by the letter "a" are to the pages of the appendix to this brief.

moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days" (3a).

Section 4 of the 1793 Act provided that citizens or inhabitants of the United States who committed crimes in Indian territory against friendly Indians "which, if committed within the jurisdiction of any state • • • against a citizen thereof, would be punishable by the laws of such state • • • [would] be subject to the same punishment, as if the offence *[sic]* had been committed within the state or district, to which he or she may belong, against a citizen thereof" (3a).

Section 5 of the 1793 Act provided that "if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe • • • he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months • • • And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who may have, or shall hereafter make, or attempt to make a settlement thereon" (4a).

Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory", and provided that persons so purchasing horses without such a special license would "forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars • • •" (4a).

Section 11 of the 1793 Act authorized the President and the territorial governors "on proof to them made, that any

citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences *[sic]* or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law" (5a).

Finally, section 12 of the 1793 Act provided that "all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use" (5a).

As the foregoing recitation makes clear, the Trade and Intercourse Act of 1793 was comprehensive both in terms of its scope and in the range of its enforcement mechanisms, which included forfeitures, criminal penalties, suspensions or revocations, and, ultimately, the direct involvement of the President of the United States.*

Moreover, as was observed by Judge Meskill in his dissent, Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines v Davidowitz*, 312 US 52 (1941), this Court held invalid under the Supremacy Clause a Pennsylvania alien registration statute which interfered with a subsequently enacted federal law involving the same subject, notwithstanding

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*Indeed, the very fact that the Second Congress vested remedial discretion in the Executive Branch lends strong support to the proposition that that body viewed these issues as essentially political in nature. This was suggested by Judge Meskill in his dissenting opinion (JA 249a), and his arguments in this regard are well taken.

the fact that the state and federal legislation were not explicitly contradictory and there was present no express Congressional intent to override State legislation. The underpinning of the *Hines* decision was the fact that the state statute fell into potential conflict with the federal law in the sensitive area of intergovernmental relations and that, since the federal government was the agent of foreign policy and had determined that a particular scheme of registration was necessary in order to avoid friction with other nations, the State statute had to fall. These same considerations apply with equal force here. As Judge Meskill stated (JA 253a):

> "The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to reassure Indians who had grown 'restive'. This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statute at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F2d 327 (2d Cir. 1981). *See Illinois v. Outboard Marine Corp.*, 680 F2d 473, 478 (7th Cir. 1982)."

In view of the great importance placed by the Congress and the President on the matter of Indian affairs in the 1790s, it is difficult to conceive that the Congress did not believe that it was speaking "directly and comprehensively" to the question of trade and intercourse with the Indians when it enacted the Trade and Intercourse Act of 1793. Moreover, and as was noted by Judge Meskill in his dissenting opinion below (JA 254a):

> "Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated."

We submit that the Trade and Intercourse Act of 1793 did, in fact, preempt any common law right of action which the Indians might have possessed prior to that law's enactment and that the failure of the law to "speak directly" to the narrow issue of "common law rights" in no way alters this result. Cf. *Hines v Davidowitz*, 312 US 52 (1941).

2. *An Indian Tribe does not possess an implied private right of action pursuant to the Trade and Intercourse Act of 1793.*

Nor is the Court of Appeals correct in holding that in enacting the Trade and Intercourse Acts, the Congress intended the Indian tribes to have a private right of action based upon its violation.

In *Daily Income Fund, Inc. v Fox*, ____ US ____, 104 S Ct 831, 78 L ed 2d 645 (1984), this Court was called upon to determine whether section 36(b) of the Investment Company Act of 1940, 15 USC, § 80a-35(b), which expressly provides that actions thereunder may be maintained either by the Securities and Exchange Commission,

or by a security holder on behalf of a registered investment company, but is silent as to the right of investment companies to bring such actions in their own behalf, created an implied right of action in an investment company. In holding that no implied right of action had been created by the Act, this Court set forth the factors relevant to the evaluation of such claims as follows, 78 L ed 2d at 655:

> "Petitioners nevertheless contend that an investment company has an implied right of action under § 36(b). In evaluating such a claim, our focus must be on the intent of congress when it enacted the statute in question. *Merrill Lynch, Pierce, Fenner & Smith v Curran*, 456 US 353, 377-378, 72 L Ed 2d 182, 102 S Ct 1825 (1982). That intent may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed. *Ibid., Middlesex County Sewerage Authority v National Sea Clammers Assn*, 453 US 1, 13-15, 69 L ed 2d 435, 101 S Ct 2615 (1981); *California v Sierra Club*, 451 US 287, 292-293, 68 L Ed 2d 101, 101 S Ct 1775 (1981); *Cannon v University of Chicago*, 441 US 677, 60 L Ed 2d 560, 99 S Ct 1946 (1979); *Cort v Ash*, 422 US 66, 78, 45 L Ed 2d 26, 95 S Ct 2080 (1975). • • • "

Applying these factors to the case at bar, the conclusion is inescapable that the Congress did not intend the Indian tribes to have a private right of action under the Trade and Intercourse Act of 1793.

While it might perhaps be argued that the Trade and Intercourse Act was passed for the protection of the Indian tribes,* nothing contained in either the language of the 1793 Act or in its legislative history tends to support in the slightest the proposition that the sanctions and enforcement provisions contained therein were intended by the Congress to be anything other than exclusive. Certainly the fact that the Trade and Intercourse Act of 1793 was essentially a criminal statute militates strongly against any other conclusion (see, e.g., *Chrysler Corp. v Brown*, 441 US 281, 316 [1979]), as does the fact that the sanctions contained in the Act would, if utilized, have provided a full and adequate remedy to the Indians for its violation. Indeed, the very failure of Congress to have provided for a private right of action in favor of the Indians when it could so easily have done so, lends strong support to the proposition that Congress either did not wish to enact such a remedy or that it never considered the issue. In either event, the conclusion would be the same—no private right of action was intended. Cf. *Transamerica Mortgage Advisors v Lewis*, 444 US 11 (1979), where this Court refused

*In view of the fact that the Trade and Intercourse Act was passed in order to avoid a war with the Indian tribes, the "especial beneficiaries" of the Act may not in the eyes of Congress have been the Indian tribes at all, whose sovereign powers were severely limited thereby (see *United States v Wheeler*, 435 US 313, 326 [1978]), but may indeed have been the citizens of the United States themselves. In any event, since the Indians' rights under the statute can be fully vindicated by the United States acting in their behalf, it would be "unnecessary to infer a right of action in favor of the [Indians] in order to serve the statute's 'broad remedial purpose' ". *Daily Income Fund, Inc. v Fox, supra*, 78 L ed 2d at 659. And, cf. *Santa Clara Pueblo v Martinez*, 436 US 49 (1978), in which this Court observed, 436 US at 64:

> "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. • • • "

to recognize an implied right of action for damages under section 206 of the Investment Advisors Act of 1940, a statute very similar to the Trade and Intercourse Act of 1793.

The Court of Appeals relies in part for its conclusion that the Congress intended the Indian tribes to have a private right of action to enforce the prohibitions of the 1793 Trade and Intercourse Act, on the admittedly sparce legislative history of the Act, including speeches by President Washington and Secretary of War Knox, who urged passage of both the 1790 and 1793 versions of the statute. The court states in a footnote (JA 229a, n 15):

> "The only remnants of legislative history available indicate that President Washington, who was the moving force behind the 1790 and 1793 Acts, thought that they permitted the Indians to bring private causes of action. Cornplanter, Chief of the Seneca Indians • • • had met with President Washington in December 1790 to present their complaints about certain land transactions entered into during the prior decade. *American State Papers*, 1 *Indian Affairs* 139 (1834). Washington assured Cornplanter that at least after 1790, 'the case [was] entirely altered: • • • any treaty formed and held without [the federal government's] authority [was] not binding.' *Id.* Moreover, '[i]f • • • you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other person.' *Id.* This speech was printed and communicated to Congress on January 11, 1792. *Id.* 142-43. Congress, therefore, was made aware of President Washington's perception of the reach of Indian law."

It is, of course, the intent of Congress, not simply the perception of the President, which is controlling. As this Court observed in *American Trucking Association v A. T. & S. F. R. Co.*, 387 US 397, 418 (1967):

> "The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. • • • "

Indeed, the conclusion reached by the Court of Appeals that the Congress, in 1793, intended to create an implied right of action in favor of the Indian tribes, flies in the face of the view, widely held until the late 19th or early 20th Century, that Indian tribes lacked the legal capacity to sue in federal court. See, e.g., *Felix v Patrick*, 145 US 317, 332 (1892); *Graham v United States*, 30 Ct Cl, 318, 336 (1895); *Seneca Nation v Christie*, 126 NY 122, 147 (1891), writ of error dismissed, 162 US 283 (1896); *Johnson v Long Island R.R. Co.*, 162 NY 462 (1900).*

Since it is the intent of the Congress viewed in "its contemporary legal context" to which the courts must look in determining whether an implied right of action in favor of the Indian tribes was intended (*Merrill, Lynch, Pierce, Fenner & Smith v Curran*, 456 US 353, 379 [1982]), and since the prevailing legal view in the late 18th Century was that Indian tribes lacked the capacity to sue in the federal courts (see, R. Clinton and M. Hotopp. *Judicial Enforcement of the Federal Restraints on Alienation of Indian*

*In *Graham v United States*, it was stated, 30 Ct Cl at 336:

> "The Indians being subject to the jurisdiction and control of the United States as 'domestic dependent nations,' they have no standing in the courts either as plaintiff or defendant except by statute, and under the act 1891, then only with the strong arm of the United States, as was held substantially in the *Jeager Case* (27 C. Cls. R., 278)."

Land: The Origins of the Eastern Land Claims, 31 Me L Rev 17, 46-49), it would be necessary, in order to support the conclusion of the court below, to ascribe to the Congress in 1793 the irrational intention of implying a private federal right of action with respect to a group which was not then believed to be capable of suing in the federal courts.* Such a conclusion is without logical foundation and should be rejected by this Court.

An equally strong basis for rejecting the implication of a private right of action in favor of the Oneidas lies in the fact that remedial discretion for trespasses upon lands protected by the Trade and Intercourse Act of 1793 was, by the plain language of the statute, specifically delegated to the President.

It need hardly be repeated here that the Constitution commits responsibility for the regulation of commerce with the Indian tribes to the Congress. US Const, Art I, § 8. However, insofar as the instant controversy is concerned, the Congress has explicitly delegated remedial discretion to the President. This is provided for by both the Trade and Intercourse Act of 1793 (3a-6a), and the Treaty with

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*In *Felix v Patrick*, *supra*, this Court said, 145 US at 330:

> "In reply to this defence [sic] of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until 1887, tribal Indians, members of the Sioux nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States. *We are by no means insensible to the force of this suggestion.* • • •" (Emphasis supplied.)

The Court said further, p 332:

> "It is scarcely necessary to say in this connection that • • • until this time [Indians] were not citizens of the United States, capable of suing as such in the Federal courts • • • ."

Six Nations (Treaty of Canadaigua), 7 Stat 44 (November 11, 1794) (JA 28a-30a), both of which are relied upon by the plaintiffs.

Section 5 of the Trade and Intercourse Act of 1793 prohibited, among other related activities, the making of any settlement by citizens or inhabitants of the United States on lands belonging to any Indian tribe. Beyond the establishment of specific criminal penalties, the law committed all other remedies to the discretion of the President (5a):

> "And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon."

Article VII of the Treaty with Six Nations contains an even broader delegation of remedial discretion to the President (JA 30a):

> "Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: *By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed • • • and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the*

> *legislature* • • • *of the United States shall make other equitable provisions for the purpose.*" (Emphasis supplied.)

That the above-quoted provisions militate strongly against the implication of a private right of action is, we submit, manifest, and it follows that the Court of Appeals erred in wholly ignoring this major indicator of Congressional intent. Furthermore, in light of the plain language of the statute, it is clear that if any remedy is to be afforded the plaintiffs for the alleged illegal occupancy of the subject lands by the Counties, such remedy, having been committed to the President in the first instance, cannot properly be fashioned by the courts except at the behest of that officer. No such request was made here.

Moreover, and not incidentally, the express commitment of remedial discretion to the President renders the "political question" doctrine directly applicable to this case.

In the case of *Baker v Carr*, 369 US 186 (1962), this Court had occasion to discuss the "political question" doctrine at some length. The Court said, 369 US at 217:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department • • • or the impossibility of deciding without an initital policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's

> undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Each of these "formulations" is, to a greater or lesser degree, "inextricable from the case at bar". *Id.*

Quite beyond the fact that, as is demonstrated above, *supra*, pp 24-26, remedial discretion in regard to settlements on Indian land has been committed to the Executive, the record in this case demonstrates that the issues raised by this litigation have, in fact, been presented to the President and that a political decision has already been made. As is witnessed by a letter dated March 15, 1968 from Robert L. Bennett, Commissioner of Indian Affairs, to Mr. Jacob Thompson, President, Oneida Indian Nation of New York (JA 42a-44a), the Oneidas had, on at least two occasions prior to the commencement of this action, petitioned the President pursuant to Article VII of the Treaty with Six Nations requesting the assistance of the United States in the prosecution of a claim against the State of New York based upon the alleged wrongful taking of Oneida lands during the period from 1788 to 1846. In declining to act upon these requests, the President, through his "superintendent", advised the Oneidas (JA 43a-44a):

> "The Oneidas have a claim currently pending before the Indian Claims Commission for the very injuries presently complained of. A petition • • • was filed on August 10, 1951 • • • which asks judgment against the United States for the fair market

> value of Oneida lands sold to the State of New York between 1788 and 1946[*]. Trial has been scheduled for February 4, 1970.
>
> "Since the United States has provided a forum for determining whether the Oneidas should be compensated for injuries sustained as a result of their eighteenth and nineteenth century dealings with the State of New York, no further government action on these claims seems necessary."**

In the face of the President's clear and considered decision to limit remedial action on the Oneidas' claims to the Indian Claims Commission, the courts below should properly have refused to entertain this lawsuit, implicating as it does both a "policy determination of a kind clearly for nonjudicial discretion" and "a political decision already made". *Baker v Carr*, 369 US at 217. Furthermore, if the lower courts' "independent resolution" of this matter does not actually express a "lack of the respect due coordinate branches of government", it certainly leaves open the very real possibility, should the Oneidas again petition the President, "of embarrassment from multifarious pronouncements by various departments on one question". *Id.*

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*This should read 1846.

**That proceeding, in which the Oneidas successfully argued that the United States had breached its fiduciary duty to protect them in land dealings with the State of New York (See *United States v Oneida Nation of New York*, 477 F2d 939, 201 Ct cl 546 [1973]), has since been terminated by a voluntary dismissal with prejudice, presumably agreed upon because the Oneidas feared that a recovery in that proceeding would bar a recovery here. *Oneida Indian Nation of New York v County of Oneida*, 622 F2d 624, 628 (2d Cir, 1980). In view of the fact that the prior proceeding has been terminated, there now exists no good reason why the Oneidas should not again seek the assistance of the President in the resolution of their claims as is provided for by the Treaty with Six Nations.

Finally, this lawsuit implicates a further element of the political question doctrine which bears discussion. The interpretation of the Trade and Intercourse Acts by the State of New York for close to two hundred years has been relied upon by countless innocent individuals who have accepted title to lands within the area of the Oneidas' claims. By any conceivable judicial resolution of this matter not wholly adverse to the plaintiffs, every title within the claim area would be put into question, and every individual living within the area may be subject to ejectment or to damages in trespass for each and every day that he or she remained in occupancy. That a "significant measure of chaos" would "inevitably" result from such a ruling cannot be gainsaid, and it is the avoidance of such a consequence which is one of the cornerstones of the political question doctrine. *Baker v Carr, supra*, at page 219. As was so aptly stated by Judge Meskill in his dissenting opinion (JA 249a):

> "This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting. • • • "

Here, the implication of a private right of action by the court below seems to have rested in large measure on the view below (JA 228a-229a) that the President or the Executive had failed in its obligations to protect Indian rights. But this Court has previously made plain that judicial dissatisfaction with the Executive provides no basis for implying judicial causes of action where enforcement authority has been vested specifically in the Executive. *Employees v Missouri Department of Public Health and Welfare*, 411 US 279, 285-287 (1973).

We submit that an Indian tribe does not enjoy a private right of action under the federal common law or pursuant to the Trade and Intercourse Act of 1793 to recover damages for the use and occupation of lands allegedly obtained from said Indian tribe in violation of the Trade and Intercourse Act. The Court of Appeals should so have held.

B. The Court of Appeals erred in rejecting any defense based upon the statute of limitations.

The plaintiffs' claim should, in any event, have been held by the Court of Appeals to be barred by the applicable federal statute of limitations. It has long been the rule in the federal courts that, unless the United States is suing in its sovereign capacity, or unless the Congress has specifically provided otherwise, the issue of timeliness of federal causes of action is governed by the most analogous state statute of limitations. See, e.g., *McClury v Silliman*, 28 US (3 Pet) 270 (1830); *Campbell v Haverhill*, 155 US 610 (1895); *Auto Workers v Hoosier Cardinal Corp.*, 383 US 696 (1966).* It follows from this that unless there exists a federal limitations period which is controlling of this action, the courts below should properly have looked to the law of New York in determining the issue of timeliness.** And this is so notwithstanding the fact that this action was brought by Indians. See, *Wilson v Omaha Indian Tribe*, 442 US 653, 671-673 (1979).

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*This rule is, of course, fully consistent with the Rules of Decision Act, 28 USC, § 1652, which declares "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply".

**The most nearly analogous New York State Statute of Limitations is contained at New York Civil Practice Law and Rules, § 212, which provides that

(Footnote continued on following page.)

The Court of Appeals, tacitly acknowledging the absence of a federal limitations period expressly applicable to the Oneidas' 1795 claim,* and citing to *Occidental Life Ins. Co. v EEOC*, 432 US 355 (1977), asserts that the application of New York's statute of limitations "would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts" (JA 232a). The court asserts further that since the United States would not be subject to state delay-based defenses if it were to bring suit on behalf of the tribal plaintiffs, it " 'would be anomalous to allow the trustee to sue under more favorable conditions that [*sic*] those afforded the tribes themselves' " (*id.*). These asseverations are not only contradictory since if the United States were to sue on behalf of the plaintiffs the alleged "violation" would clearly not "go unremedied", but there is absolutely nothing anomalous in allowing suit by the United States under conditions where its so-called Indian "wards" could not. This is the teaching of *United*

(Footnote continued.)

"An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action."

Pursuant to section III of chapter 63 of the Laws of New York of 1788 (passed February 26, 1788), which was in effect in 1795, possessory actions based upon the possession of the suitor's ancestors had to be brought within 50 years; pursuant to section IV of that law, possessory actions based upon the suitor's own possession had to be brought within 30 years.

*The court's reliance upon 28 USC § 2415, as providing "some guidance in the present situation" (JA 232a), is not well taken inasmuch as that statute explicitly applies only to suits brought by the United States. The legislative history of section 2415 bears this point out. See, e.g., Cong Rec V. 123, p 22170 (July 11, 1977) (Remarks of Mrs. Collins); p 22500 (July 12, 1977) (Remarks of Mr. Foley); p 22507 (Remarks of Mr. Dicks); p 22508 (Remarks of Mr. Foley); p 22510 (Remarks of Mr. Udall).

States v Minnesota, 270 US 181 (1926), and there exists no good reason why that case should not be followed here.

We submit that the Court of Appeals erred in failing to apply the New York statute of limitations to this suit, which was admittedly instituted 175 years after the cause of action accrued, and there should consequently be a reversal.*

C. The Treaty of 1795 between the Oneida Indian Nation and the State of New York has been ratified by the United States.

The Court of Appeals' rejection of the defense of ratification was likewise erroneous. It has, we submit, long been established that the United States may, by its subsequent actions, ratify, and thereby validate, transfers of land by Indian tribes which could otherwise be voided because of the Trade and Intercourse Acts. See, *Seneca Nation of Indians v United States*, 173 Ct Cl 912 (1965); *cf. De Coteau v District County Court*, 420 US 425 (1975); *Rosebud Sioux Tribe v Kneip*, 430 US 584 (1977).

In *Seneca Nation of Indians v United States*, *supra*, the Seneca Nation sued the United States for indemnification

*The State does not wish to be understood as arguing that delay-based defenses may be employed by a defendant to "bar the rights of [Indians] in lands subject to statutory restrictions". *Ewert v Bluejacket*, 259 US 129, 138 (1922); but see, *Felix v Patrick*, 145 US 317, *supra*. However, as was observed by the New York Court of Appeals in *Seneca Nation v Christie*, *supra*, the "question is not whether an Indian title can be barred by adverse possession or by state statutes of limitations", 126 NY at 147, but whether "the Statute of Limitations is a bar to the *action*", *id.*; emphasis supplied. Since the Trade and Intercourse Act of 1793 explicitly delegated remedial discretion to the Executive, it would in no way be inconsistent with the "underlying policies of the * * * statute" for this Court to hold that, if a private right of action in favor of the plaintiffs exists, the timeliness of the action must be measured against the New York statute of limitations. Indeed, since the Executive would continue to enjoy the power to remedy violations of the Act, such a holding would be more consonant with the policies underlying the statute than otherwise.

for a tract of land taken by the State of New York by eminent domain during the middle of the 19th Century. In rejecting the Senecas' contention that the United States, as fiduciary, was responsible to the Seneca Nation for not having recaptured the acreage, which had allegedly been taken in contravention of the Trade and Intercourse Act, 25 USC, § 177, the Court of Claims held, *inter alia*, 173 Ct Cl at 915:

> "if federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant would have no complaint if assent had been given at the time of the appropriations. *But approval can also come afterwards*, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except 'that this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings.' Act of January 5, 1927, ch 22, 44 Stat. 932, 933. This *explicit recognition and implicit ratification* of New York's ownership of the tract must be taken as Congress's [*sic*] approval of the original appropriation, as well as of the state's continued claim of right * * * [footnotes omitted]". (Emphasis supplied.)

In the instant case, both "explicit recognition and implicit ratification" of the 1795 conveyance are provided by the Treaties of June 1, 1798 and June 4, 1802 (JA 36a-37a, 38a-40a).

The Treaty of June 1, 1798, which was federally supervised, and by which the Oneida Nation ceded to the State of New York certain of its lands, contains the following language (JA 36a-37a):

> "the said [Oneida] Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 *in the last purchase from them* [*] running northerly to a button wood tree * * * standing on the bank of the Oneida Lake * * * And * * * do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows—that is to say Beginning in the South east Corner of Lot No. 59, *in the said last Purchase* * * *." (Emphasis supplied.)

Similarly, the Treaty of June 4, 1802, which was also federally supervised, contains the following language (JA 38a-39a):

> "The said [Oneida] Indians do Cede release and quit claim to the people of the State of New York forever * * * All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, *to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York* * * *." (Emphasis supplied.)

We submit that the use of the phrase "last purchase" in the 1798 Treaty, and the phrase "heretofore ceded" in the Treaty of 1802, demonstrate both an awareness and an approbation on the part of the United States of the 1795

*It is acknowledged by the Court of Appeals that the "last purchase" referred to the 1795 transaction (JA 235a-236a).

transaction. Certainly had the Federal government wished to convey the message that the latter treaties did not constitute such approval, it could easily have done so while still employing the 1795 boundaries for descriptive purposes.* That it did not do so, we submit, constitutes additional evidence of ratification.

Furthermore, it is of no little significance that, at least since 1795, the land here at issue has been treated by both the State of New York and the federal government as being under the jurisdiction of New York. As this Court was moved to observe in *Rosebud Sioux Tribe v Kneip, supra*, 430 US at 603-605:

> "Since state jurisdiction over the area within a reservation's boundaries is quite limited * * * the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the

*The Court of Appeals' rejection of the defense of ratification was based in part upon the court's view that the "isolated references to land boundaries in the 1798 or 1802 treaties" amounted to "little more than 'metes and bounds' descriptions", which were not "sufficient to constitute ratification of the 1795 transaction" (JA 236a). This holding completely ignores the fact that in describing the 1795 transaction as a "purchase" and in describing the subject lands as having been "heretofore ceded", the drafters of the 1798 and 1802 Treaties were employing specific and not general language, and that the use of that terminology could not reasonably have been interpreted to mean anything other than that the 1795 purchase had been deemed effective to pass good title. Nor is the Court of Appeals correct in its assertion that there "is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale" (JA 237a). The District Court specifically found that both Secretary of War Timothy Pickering, and Israel Chapin, Jr., Superintendent of Affairs of the Six Nations, were aware of New York's attempts to deal with the Oneidas in 1795 and had attempted to prevent the tribe from consummating any transaction (JA 55a-57a). The clear message that emerges from the use of the terms "purchase" and "cession" in the later treaties, therefore, is that the attitude of the Government had changed and that it by then recognized the validity of the 1795 purchase.

'jurisdictional history.' The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges • • • [Citations and footnotes omitted]."

These same considerations apply with equal force to the case at bar. It is our position that the language employed in the Treaties of 1798 and 1802 constitutes a plain and unambiguous expression of federal ratification of the 1795 Treaty, and the Court of Appeals' holding to the contrary should therefore be rejected.

POINT II.

The Court of Appeals erred in holding the State liable for indemnification of the Counties on their cross claim.

A. Since the federal courts would lack jurisdiction over the State in an original action brought against the State by the Counties because of the State's sovereign immunity, the courts also lack ancillary jurisdiction on the same issues.

In ruling that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State of New York, the Court of Appeals focused its attention solely upon the question of whether the Counties' actions for indemnification arose out of the "same core of facts" as did the Oneidas' claims against the Counties and, having concluded that they did, held that no independent basis for jurisdiction was necessary (JA 244a). However, as this Court's recent decision in *Pennhurst State School & Hosp. v Halderman*, US , 79 L ed 2d 67 (1984),

makes clear, the focus of the Court's inquiry was too narrow, and because the third-party defendant in this case is a nonconsenting State, the indemnification action should have been dismissed.•

In *Pennhurst State School & Hosp. v Halderman, supra*, this Court had before it the question of whether the doctrine of pendent jurisdiction could "be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment". 79 L ed 2d at page 90. In specifically rejecting any such contention, the Court stated, *id.* at page 92:

> "contrary to the view implicit in decisions such as [*Greene v Louisville & Interurban R. Co.*, 244 US 499 (1917)], *supra*, neither pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment. *A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment.* We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See *supra*, at , 79 L Ed 2d 82. *We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction* [footnote omitted]." (Emphasis supplied.)

In *Aldinger v Howard*, 427 US 1 (1976), these principles were discussed in relation to a third-party claim. This Court stated, 427 US at page 18:

> "If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more

•Although the holding in *Pennhurst* relates specifically to "pendent" jurisdiction rather than to "ancillary" jurisdiction, the Court's analysis of the jurisdictional issue is, we submit, equally relevant to either.

serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. • • •"

In *Aldinger, supra*, the Court held that a county could not be included as a party in a federal action simply because it might be required to indemnify the other defendant under state law. The Court explained that even though the third-party claims would be within the scope of Article III jurisdiction because of a "common nucleus of operative facts", it must also be determined if federal jurisdiction may otherwise be negated. While in that case the Court focused on Congressional intent, *Pennhurst, supra*, makes clear that an immunity to suit under the Constitution represents an equally strong barrier to a third-party claim.* We submit that there is no meaningful difference between *Aldinger* and the present case merely because here the third party from whom indemnity is sought has been brought in by the defendant rather than by the plaintiff, although we recognize that in *Aldinger*, the Court declined to determine if there existed any " 'principled' differences between pendent and ancillary jurisdiction • • •".

In the case at bar, the Court of Appeals erred in completely disregarding the constitutional impediment to the Counties' actions—the State's sovereign immunity. This point was considered in *United States v United States Fidelity & Guaranty Co.*, 309 US 506 (1940), where this Court said, page 513:

"Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly

*Article III of the Constitution originally provided that the federal courts had jurisdiction in controversies "between a State and citizens of another state". The Eleventh Amendment limited that power by providing it did not extend to suits prosecuted by a citizen or subject of a foreign State against a State. *Hans v Louisiana*, 134 US 1, 13 (1890), held that the bar included actions by citizens of the same State.

followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereign possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent [footnote omitted]. • • •"

Jones v Scofield Bros., Inc., 73 F Supp 395 (D Md, 1947), illustrates this limitation with respect to States. In *Jones*, the original defendant sought a judgment against the State Roads Commission of Maryland as a third-party defendant. The Commission, as a State agency, claimed Eleventh Amendment immunity. The court there granted a motion to dismiss the third-party complaint against the State Roads Commission as third-party defendant, saying that the doctrine of sovereign immunity is still the law and that while many jurisdictions have waived or partially waived their immunity to suit, Maryland had not done so. The court held that the Commission was immune from suit and that the advisability of the immunity was a legislative question.

The court below relied on *Agrashell, Inc. v Bernard Sirotta Co.*, 344 F2d 583 (2d Cir, 1965); *Dery v Wyer*, 265 F2d 804 (2d Cir, 1959), and *Ayer v General Dynamics Corp.*, 82 FRD 115 (SDNY, 1979). However, those cases are inapposite; none of them deal with a State as a third-party defendant. In all three, the courts held that no independent ground for jurisdiction against a third-party defendant is necessary in an action where the court's original jurisdiction was based upon diversity grounds. The need for complete diversity, however, is a judicial determination and one which was within the power of Congress to have changed. In those cases, there was involved no constitutional objection to jurisdiction. In the instant case, quite to the

contrary, lack of jurisdiction over the State is not based upon statutory grounds or court determinations, but upon constitutional grounds. Neither the convenience of the litigants nor considerations of judicial economy can serve to override the Constitution; neither should suffice to justify extension of the doctrine of ancillary jurisdiction to permit a suit against a nonconsenting State where the State has not waived its sovereign immunity* and where no independent basis for jurisdiction exists. Cf. *Pennhurst State School & Hosp. v Halderman, supra* at page 93.

We submit that in order for a federal court to obtain ancillary jurisdiction over a State, the State must be independently subject to federal jurisdiction. In this case, no independent basis for jurisdiction exists. The Counties' third-party complaints should consequently have been dismissed.

B. The Court of Appeals erred in holding that the State of New York had, by negotiating treaties with the Oneidas, impliedly waived its immunity to suit in federal court by non-Indian claimants, the only claimants against the State involved here.

The court below, in holding that the State of New York, by dealing with the Oneida Indians in alleged violation of the Trade and Intercourse Act of 1793, had impliedly consented to a waiver of its Constitutional immunity for suits

*Even if it were assumed that the State's acts in dealing with the Oneidas would constitute a waiver of immunity if the Oneidas were seeking relief from the State, there is simply no reasoned basis for extending such a waiver to the Counties' dealings with the State. It is vital to bear in mind that in these third-party actions for indemnification, the Counties do not stand in the stead of the Oneidas. The Counties' actions are not Indian actions. They are simply actions for money damages as indemnity resulting from an alleged breach of implied warranties. The only forum where such an action may properly be brought is in the New York State Court of Claims. See, *Great Northern Life Ins. Co. v Read*, 322 US 47, 54 (1944).

by the Counties has, we submit, totally misread and misapplied the teachings of this Court in *Edelman v Jordan*, 415 US 651 (1974); *Employees v Missouri Department of Public Health and Welfare*, 411 US 279 (1973), and *Parden v Terminal Railway Co.*, 377 US 184 (1964).

The mere fact that New York may have entered into a federally regulated sphere of activity in dealing with the Oneidas is, under this Court's decisions, plainly insufficient, in and of itself, to constitute a waiver of the State's immunity. And, quite contrary to the decision below, there is especially no basis for such a conclusion with respect to the State's dealing with non-Indian third parties, the only type of parties suing the State here.

In *Edelman v Jordan*, 415 US 651 (1974), this Court emphasized that in cases involving a State, the first question that must be considered is whether Congress has authorized a suit to be brought against a class of defendants which includes the States. Justice Rehnquist noted in *Edelman* at page 672:

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. * * *"

Such authorization is also missing from the Trade and Intercourse Act even if, contrary to our position in Point I, a right of action against private parties were implied.

The logic of the Court's position in *Edelman* is compelling. The ultimate question before a court looking at an alleged implied waiver of the Tenth or Eleventh Amendments is whether Congress intended to require that waiver. See, *Pennhurst State School & Hosp. v Halderman, supra*, 79 L ed 2d at 77-78. This question was never addressed by the Court of Appeals. We submit that there is contained

in the Trade and Intercourse Act not the slightest evidence of a Congressional intent to create a private right to sue a State in the federal courts, and the Court of Appeals should so have held.

The basic reliance of the court below (JA 246a-248a) on *Parden v Terminal Railway Co.*, 377 US 184 (1964), is misplaced for other reasons as well. There, this Court held that Alabama, by operating a railroad in a proprietary manner for a profit in interstate commerce, had impliedly waived its immunity to suits in the federal courts. The court below characterized the State's acquisition from the Oneidas as proprietary (JA 247a) and found *Parden* controlling. But New York's acts in securing possession of lands to which it held legal title as sovereign* and making it available for settlement were acts of a sovereign nature and the State was not engaging in private enterprise. The importance of this point cannot be overstated because in *Employees, supra*, 411 US 279 (1973), this Court *limited* application of *Parden* to cases in which the States were engaged in profit-making commercial programs. In *Employees*, State employees sought overtime compensation which was allegedly due them under the Fair Labor Standards Act (29 USC, § 216[b]). In holding that the State of Missouri was immune from suit in the federal courts based upon alleged violations of the Act, this Court distinguished *Parden*, saying, 411 US at page 284:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State. *Parden* involved the railroad business which Alabama operated 'for profit'. 377 U.S., at 185. *Parden* was in the area

*Title to the lands had been in the State of New York since the successful conclusion of the Revolutionary War. It was, however, encumbered by the Oneida Indians' right of occupancy. See, e.g., *Clark v Smith*, 38 US (13 Pet) 195 (1839).

> where private persons and corporations normally ran the enterprises."

The Court added, page 285:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."

The Court said further, pages 286-287:

> "It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear."

Moreover, this Court in *Employees* distinguished *Parden* on the further grounds, equally applicable here, that another remedy existed; specifically, there the Secretary of Labor was authorized to enforce the rights of individual employees by actions against employers, including States. Those provisions, the Court said, 411 US at 286:

> "suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain

why Congress was silent as to waiver of sovereign immunity of the States • • •."

Here, the President was also given remedial authority, a fact that just as in *Employees* militates strongly against a remedy of waiver by the State. Indeed, this is especially so since the claimed waiver here relates not to suits by Indians, but rather solely to the cross-claims of the Counties.

Finally, in this regard, the words of this Court in *Pennhurst State School & Hosp. v Halderman, supra*, are well worth repeating in their entirety. The Court observed, 79 L ed 2d at 77-78:

> "A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court. See, e.g., *Clark v Barnard*, 108 US 436, 447, 27 L Ed 780, 2 S Ct 878 (1883). We have insisted, however, that the State's consent be unequivocally expressed. See, e.g., *Edelman v Jordan*, 415 US 651, 673, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see *Fitzpatrick v Bitzer*, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976), we have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.' *Quern v Jordan*, 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979) (holding that 42 USC § 1983 [42 USCS § 1983] does not override States' Eleventh Amendment immunity). Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's

> constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued. As Justice Marshall well has noted, '[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.' *Employees v Missouri Public Health & Welfare Dep't*, 411 US 279, 294, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Marshall, J., concurring in result). Accordingly, in deciding this case we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine.' *Hutto v Finney*, 437 US 678, 691, 57 L Ed 2d 522, 98 S Ct 2565 (1978) [footnotes omitted]." (Emphasis in original.)

We submit that the Court of Appeals erred in holding that New York's sovereign immunity is not a bar to the Counties' third-party actions against the State; a reversal on this ground is fully warranted.

C. Substantive New York law does not permit the imposition of an award against the State in an amount other than that specifically provided by the New York Law of Real Property.

Finally, and quite apart from the issues of jurisdiction and sovereign immunity, we submit that the Court of Appeals simply erred in holding that the Counties were entitled to any but the relief specifically provided for by the New York law of real property. In relying for its holding upon authorities speaking generally to New York's law of indemnity,* the court below wholly ignored the fact that the Counties' actions against the State are essentially an attempt to imply a warranty of title for the conveyance of

*None of the authorities relied upon by the court below (JA 244a-245a) involved the New York law of real property.

real property by the State. As such, it was New York's law of real property to which the Court of Appeals should have looked in fashioning a remedy, and the fact that it did not do so constituted serious error.

The claims against New York stem from the alleged wrongful act of the State in acquiring Indian lands in violation of the Trade and Intercourse Act and the subsequent conveyance of those lands through mesne to the Counties in the early 1800s: They are at bottom contract claims and thus depend for their vitality on the demonstration of a contractual relationship to indemnify for failure of title either by express or implied covenant. Here, no such demonstration has been made.

Nowhere is it alleged that the patents issued by the State of New York contained any covenants. Indeed, the practice of New York was to issue quit claim patents in the early 1800s when these patents must have been issued and such patents were at the sole risk of the purchaser as to the validity of the title granted. See, Getman, *Principles and Source of Title to Real Property as Between the State and the Individual and the Relative Rights of Individuals* (1921), page 240. Moreover, New York law does not recognize an implied warranty of title for real property. See, generally, Thompson, *Real Property Law*, 1941, Vol 7, page 161, § 3676; see, also, New York State Real Property Law, § 251, which provides that a covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not. (Section 251 of the New York State Real Property Law can be traced back to the adoption of the first Revised Statutes. It appears in the Revised Statutes of 1827, Part II, chapter 1, title 2, article 4, section 140.*) An examination of New York case law bears this point out as well.

*Section 140 reads as follows:

> "No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not."

Section 140 was a codification of New York State common law. See, *Frost, Cole and Crosby v Raymond*, 11 Caine 188 (Sup Ct, 1804).

In *Burwell v Jackson*, 9 NY 535 (1854), the Court of Appeals distinguished between a contract for the sale of real property and a deed of conveyance of property, holding that while a contract implies a promise that the seller will convey good title to property a deed does not. The purchaser may refuse the land if there exists a defect in title. After this grant is accepted, this right terminates.

In *Whittemore v Farrington*, 76 NY 452 (1879), the Court again held there was no implied warranty of title. In *Whittemore*, the Court also held, page 458:

> "Where both parties are innocent of fraud and both know the character and contents of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have exacted, and would have been entitled to exact, a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject the instrument which he accepted. *It is beyond the power even of a court of equity to make contracts for parties.* • • •" (Emphasis supplied.)

This, in effect, is what the court below did here.

In *Coffin v The City of Brooklyn*, 116 NY 159 (1889), this rule was applied with respect to a purchase from the City of Brooklyn. There, the Court held there was no cause of action in favor of the grantee against the grantor City because the tax sale, through which the City claimed its rights, was defective. The tax sale in that case is analogous to a patent of lands to which the sovereign has acquired a defective title. In *Coffin*, the Court held that not only was a warranty not implied but the only warranties that could have been made were under existing statutory authority. In the instant case, no statute creating a warranty has even been alleged.

People ex rel. Hall v Woodruff, 57 App Div 342 (3d Dept, 1901), considers the question of implied covenants in a patent. The court stated the following, page 346:

> "Under this provision, the commissioners issued to the relator letters patent in the form which had been adopted by the board. This form is merely a quitclaim. It contains no covenants, and expressly provides that 'These Presents shall in no wise operate as a warranty of title.' The effect of these letters patent was to convey to the relator only such interest in the land as the grantor had. There was no implied covenant of warranty, and in case of failure of title the grantee was without any remedy against the grantor. (2 R.S. [9th ed.] 1812, § 140; *Murray v. Ballou*, 1 Johns. Ch. 577; *Burwell v. Jackson*, 9 N. Y. 541; *Mayor v. Mabie*, 13 *id.* 158.)"

Because of this absence of remedy the Revised Statutes of 1827, Part I, chapter 9, title 5, article 1 (now Public Lands Law, § 6) was enacted which provides that where title to lands patented by the State fails, a claim may be made for the refund of the purchase price to the Commissioner of the Land Office. *People ex rel. Ostrander v Chapin*, 109 NY 177 (1888), in dealing with this section stated that the refund may be made to the purchaser, his representatives or assignees and further held that the grantee of the original purchaser is an assignee under that section.

It follows from the foregoing that no covenant to indemnify arose because of the conveyance by the State and only the statutory rights under Public Lands Law, § 6 are available to the Counties. Under that section, a claim may

be made for the refund of the purchase price to the Commissioner of General Services (successor to the Commissioner of the Land Office). If satisfied with the facts, the Commissioner may certify this to the Court of Claims. In such a case, the Court of Claims is empowered to award damages to the holder of the patented lands but damages are limited so as not to exceed the purchase price originally paid for such lands.* The Counties' remedy in this case is limited to those provided under Public Lands Law, § 6. Any other conclusion would completely upset the law of real property.

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*The award of interest is not contemplated by the statute.

CONCLUSION.

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Dated: Albany, New York
June, 1984

Respectfully submitted,

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APPENDIX—CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

U. S. Constitution, Article I, Section 8, Subd. 3.

"The Congress shall have Power.—

"Regulation of commerce—3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U. S. Constitution, Article III, Section 2, Subd. 1.

SECTION 2.

"Jurisdiction of Federal courts.—

1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U. S. Constitution, Tenth Amendment.

ARTICLE X.

"Powers not delegated, reserved to States and people respectively.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Constitution, Eleventh Amendment.

ARTICLE XI.

"Judicial power of United States not to extend to suits against a State.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Trade and Intercourse Act of 1793.

CHAP. XIX—*An Act to regulate Trade and Intercourse with the Indian Tribes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

SEC. 2. *And be it further enacted,* That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

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SEC. 3. *And be it further enacted*, That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: *Provided*, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

SEC. 4. *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

SEC. 5. *And be it further enacted*, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one

hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

SEC. 6. *And be it further enacted*, That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act: *Provided also*, That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the

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value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

SEC. 7. *And be it further enacted*, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the court, before which the conviction shall be had, not exceeding twelve months.

SEC. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed, *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

SEC. 9. *And be it further enacted*, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause

them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided*, That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

SEC. 10. *And be it further enacted*, That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

SEC. 11. *And be it further enacted*, That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all

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cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

SEC. 12. *And be it further enacted*, That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

SEC. 13. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

SEC. 14. *And be it further enacted*, That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

SEC. 15. *And be it further enacted*, That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

APPROVED, MARCH 1, 1793.

AMICUS CURIAE

BRIEF

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No. 83-1240

In The

Supreme Court of the United States

October Term, 1983

Supreme Court, U.S.
FILED
JUL 18 1984
ALEXANDER L. STEVAS,
CLERK

THE STATE OF NEW YORK,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* COUNTY OF FRANKLIN, NEW YORK, AND COUNTY OF ST. LAWRENCE, NEW YORK, IN SUPPORT OF RESPONDENTS THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK.

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PRELIMINARY STATEMENT

Amici are the County of Frankin, New York, and the County of St. Lawrence, New York. This Brief is addressed to the issues presented by the State of New York (the "State") which relate to the right of the County of Oneida, New York, and the County of

Madison, New York, to complete indemnity from the State for any judgment rendered in favor of the plaintiffs. It is filed in opposition to the State's appeal on those issues. This Brief is being filed with the consent of all parties, and a Stipulation to that effect is filed herewith.

The Counties herein are among the defendants in a lawsuit brought by the Canadian St. Regis Band of Mohawk Indians and seven individual Indians seeking to be restored to immediate possession of approximately twelve thousand acres of land in northern New York. *Canadian St. Regis Band of Mohawk Indians v. The State of New York*, N.D.N.Y. Civil No. 82-CV-783. Plaintiffs in that action seek a declaration that they own and have a right to recover immediate possession of the subject land, trespass damages in an amount equal to the fair rental value of the property for approximately 130 to 170 years, damages for waste, and interest. The Complaint has been dismissed by the District Court, insofar as it was brought by the seven individual plaintiffs, for lack of standing and jurisdiction. *Canadian St. Regis Band of Mohawk Indians v. The State of New York*, 573 F. Supp. 1530 (N.D.N.Y. 1983).

The potential for disruption should the Canadian St. Regis plaintiffs prevail in their action against the *Amici* cannot be overstated. The Counties' ownership and control over public land, utilized to provide a wide range of public services such as highways and utilities, would be lost. Private ownership of real estate in the affected areas would be thrown into disarray. The damages sought by the Canadian St. Regis Band, including interest, cover a period of approximately 130 to 170 years. The financial burden of paying any such potential award could force the sparsely populated Counties of Franklin and St. Lawrence to default on their debts and to reach the point where they would no longer be able to finance municipal services.

There is no dispute that the alleged predecessors in interest of the Canadian St. Regis agreed to sell the lands in issue to the

State. This is what the plaintiffs have alleged. The claimed defect in these transactions involved no fraud or mistake, but is instead bottomed on the absence of a federal representative to oversee the transactions.

The State has raised three questions before this Court that are of great importance in the pending action of the Canadian St. Regis. These issues are (1) whether the District Court has ancillary jurisdiction over the claims by the Counties of Oneida, New York, and Madison, New York, against the State for indemnity; (2) whether the sovereign immunity of the State is a bar to the claims of the Counties of Oneida and Madison for indemnity; and (3) whether, assuming federal court jurisdiction, New York substantive law would limit or prevent a recovery by the Counties of Oneida and Madison on their indemnity claims. Resolution of these issues in the case now before this Court may be dispositive of whether the Counties or the State will bear the cost of any recovery by the plaintiffs in the Canadian St. Regis action as well.

In order to recover on their Complaint against the *Amici*, the Canadian St. Regis plaintiffs must prove, among other things, that the State violated the federal Nonintercourse Act, now codified at 25 U.S.C. § 177, in the original acquisition of the disputed property and that the Counties now wrongfully occupy the land alleged to have been illegally acquired by the State. If the Canadian St. Regis plaintiffs are successful and if the State prevails on the issues addressed in this appeal, innocent taxpayers and residents of the *Amici* Counties may bear the burden of a recovery by the Canadian St. Regis Band based upon a proof of wrongdoing which is attributable only to the State. A decision in favor of the Counties of Oneida and Madison on their claims of indemnity over against the State may have the beneficial effect of assigning the cost of the recovery to the State, the only alleged wrongdoer in the original transactions.

SUMMARY OF ARGUMENT

I.

The Court of Appeals properly held that the District Court did not err when it exercised ancillary jurisdiction over the subject matter of the third-party claims of the Counties for indemnity against the State of New York. The same core of operative facts that gave rise to the liability of the Counties of Oneida and Madison, New York, to the plaintiffs for damages for a violation of a federal statute establish the common law duty of the State to indemnify the Counties. It was alleged by the plaintiffs in their Complaint and was found by the District Court that the State, by entering into the 1795 Treaty with the Oneidas, violated the Trade And Intercourse Act of 1793. The State's interest in some of these lands subsequently devolved upon the Counties, who were innocent of any wrongdoing and who now occupy part of that land wrongfully acquired by the State, for public purposes. The jurisdiction of the District Court over the third-party claim under Rule 14(a) of the Federal Rules of Civil Procedure is ancillary to and dependent upon its subject matter jurisdiction over the main action. The action arises under a federal statute, the Trade And Intercourse Act of 1793. The recent decision of this Court in *Pennhurst State School & Hospital v. Halderman*, ____ U.S. ____, 104 S. Ct. 900, 79 L. Ed.2d 67 (1984), is distinguishable from the instant case on several grounds. These factors present in *Pennhurst, supra*, and absent in this case include *pendent* jurisdiction, a claimed violation of a *Pennsylvania* statute by state officials, and a *direct claim* by plaintiffs against State officials for monetary damages and injunctive relief.

II.

The State's argument that the Eleventh Amendment bars the action by the Counties of Oneida and Madison is similarly misplaced. This Court has delineated a two-fold analysis in order to

determine whether a state's Eleventh Amendment immunity has been overcome. First, it must be shown that Congress has authorized suit against the state in the face of that state's Eleventh Amendment immunity. There is no evidence of such intent in the enactment of the Trade And Intercourse Act of 1793 because the Eleventh Amendment was not even proposed to the states until 1794 and was not ratified until 1798. Indeed, the Eleventh Amendment was proposed to override the prevailing sentiment that states were subject to suit at the time of the enactment of the Trade And Intercourse Act of 1793. Secondly, the Court has held that the state must have consented to suit in federal court, either expressly or impliedly, or Congress must have chosen to abrogate the state's immunity. By entering into a field which had been reserved to Congress and in which Congress had expressly and specifically acted, the state consented to the exercise of federal jurisdiction. Moreover, Article I, Section 8, of the Constitution reserves the power to trade with the Indians to the federal government, and by ratifying the Constitution, the State consented to an abrogation of the powers it would otherwise have in this field.

III.

The State also argues that the New York law of real property limits or precludes the Counties' claims over against it for indemnification. The State's argument is inapposite since the Counties' claims, though quasi-contractual in nature, sound in tort. The Counties' right to recovery over against the State is premised upon the fundamental principle that the wrongdoer should bear the ultimate burden of payment. A simple application of the equitable principles underlying the laws of implied indemnification requires the State to indemnify the Counties for the loss they have suffered as a result of the State's violation of federal law.

ARGUMENT

POINT I

THE DISTRICT COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF THE THIRD-PARTY COMPLAINTS OF THE COUNTIES AGAINST THE STATE FOR INDEMNITY UNDER THE DOCTRINE OF ANCILLARY JURISDICTION.

In its Decision dated September 29, 1983, in this action, the Court of Appeals for the Second Circuit affirmed the finding of the District Court. The Court of Appeals held, *inter alia*, that the Counties were entitled to indemnification from the State for any damages assessed against the defendants for their possession of the plaintiffs' land. [Jt. App. at 243a-248a.]

In the Courts below, the State argued that the third-party claims of the Counties should be dismissed for lack of subject matter jurisdiction, for failure to state a cause of action, and as being barred by the Eleventh Amendment to the United States Constitution. On the appeal to this Court, the State presents jurisdiction and sovereign immunity as the sole grounds for dismissal of the Third-Party Complaints.

The State was impleaded by the Counties in two separate Third-Party Complaints to obtain judgment over and against the State for any amounts recovered against the Counties by the plaintiffs pursuant to Rule 14(a) of the Federal Rules of Civil Procedure. [Jt. App. at 18a-22a.] No other form of relief is sought against the State by the Counties.

Both the District Court and the Court of Appeals held that the District Court has subject matter jurisdiction over the third-party claims of the Counties against the State under the doctrine of ancillary jurisdiction. [Jt. App. 192a-193a, 243a-244a.]

The judicial doctrine of ancillary jurisdiction establishes that, if a District Court has jurisdiction over the subject matter of the

principal action, it may, within its discretion, exercise jurisdiction over any ancillary or dependent claims. This jurisdiction exists, irrespective of the existence of any factor that would normally be required to establish an independent basis for subject matter jurisdiction over that claim.

Impleader of a third-party defendant under Rule 14(a) falls within ancillary jurisdiction. *See* 13 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction § 3523.

In *Fulton National Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925), this Court stated:

> [T]hat when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. *Hoffman v. McClellan*, [sic] 264 U.S. 552, 558, and authorities there cited.

The related, and sometimes overlapping, doctrine of pendent jurisdiction was discussed at length by this Court in the landmark case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The plaintiff in *Gibbs* had alleged a federal statutory claim of a secondary boycott and Tennessee common law causes of action of unlawful conspiracy, unlawful boycott, and interference with contracts of employment and haulage. Jurisdiction was entertained by the District Court over the state law claims under the doctrine of pendent jurisdiction. This Court stated, at page 725:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."

> The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S. Ct. 549, 77 L. Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. [Emphasis in original.]

In *Moor v. County of Alameda*, 411 U.S. 693, 715 (1973), this Court sanctioned the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction under the "well-established doctrine of ancillary jurisdiction" in the context of third-party claims under Rule 14(a).

In *Aldinger v. Howard*, 427 U.S. 1 (1976), this Court held that "pendent-party" jurisdiction was not available in a Civil Rights Act case to adjudicate state law claims against a party as to whom no independent basis of federal jurisdiction existed. The issue was whether the doctrine of pendent jurisdiction extended not only to additional claims between parties where federal jurisdiction was present, but also to additional parties who were joined in the action and for whom no independent basis of jurisdiction existed. This Court, at page 13, declined to decide "whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences."

The District Court in this case, Senior Judge Edmund Port, considered this Court's holding in *Aldinger* and held that *Aldinger* "does not destroy the jurisdiction of the [District] Court over the indemnity claim asserted by the Counties against the State." [Jt. App. at 192a.] Judge Port stated that this Court has already held, in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, (1974), when this case was first before this Court, that

federal court subject matter jurisdiction of the claims for relief of the plaintiffs against the Counties exists. Judge Port held that, since the Counties' claim for indemnity arises out of the same core of facts as the plaintiffs' original claims, i.e., the violation of the Trade And Intercourse Act of 1793, ancillary jurisdiction over the third-party claims for indemnity against the alleged wrongdoer, the State, under federal common law also exists. [Jt. App. at 192a.]

The Court of Appeals also rejected the subject matter jurisdiction argument of the State, affirmed the findings and conclusions of Judge Port, and held that the Counties' indemnity claims against the State are based on the same core of facts that established the Counties' liability to the Oneidas. The Court of Appeals stated that "[t]he Oneidas alleged and proved that the State had violated the 1793 Trade And Intercourse Act . . . [and] that the Counties were wrongfully occupying this land that had devolved from the State to the Counties." Since the same facts establish the legal and equitable bases for the Counties' indemnity action, the Second Circuit held that the District Court had jurisdiction over the third-party claims which were ancillary to its jurisdiction over the main action. [Jt. App. at 243a-244a.]

In *Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365 (1978), this Court, at page 370, in footnote no. 8, again declined to determine "whether there are any 'principled' differences between pendent and ancillary jurisdiction." In *Kroger*, this Court established three tests or standards to ascertain whether pendent or ancillary jurisdiction properly exists. These requirements are:

1. The federal and non-federal claims must arise from "a common nucleus of operative fact," the constitutional basis of *Gibbs*, supra;

2. There must be an examination of the posture in which the non-federal claim is asserted; and

1. There must be a review of the specific federal statute that confers jurisdiction over the federal claim in order to determine whether Congress has expressly or implicitly negated the exercise of jurisdiction over the particular non-federal claim. *Kroger*, *supra*, 437 U.S. at 373.

In *Kroger*, at page 376, this Court rejected pendent jurisdiction and stated:

> First, the nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is. A third-party complaint depends at least in part upon the resolution of the primary lawsuit. See n. 3, *supra*. Its relation to the original complaint is thus not mere factual similarity but logical dependence.

The District Court's findings and conclusions in this case are consistent with the three tests of *Kroger*. The District Court has ancillary jurisdiction over the third-party claims of the Counties for indemnity. Absent a clear showing by the State of an abuse of discretion by Judge Port, the finding of ancillary jurisdiction by the District Court should not be reversed by this Court.

In support of its argument before this Court, the State relies heavily upon this Court's recent decision in *Pennhurst State School & Hospital v. Halderman*, ____ U.S. ____, 104 S. Ct. 900, 79 L. Ed.2d 67 (1984).

The State readily concedes, in a footnote of its Brief, at page 17, that *Pennhurst* "relates specifically to 'pendent' rather than to 'ancillary' jurisdiction." Neither of the lower courts in this case has relied upon the doctrine of pendent jurisdiction to establish the District Court's jurisdiction over the subject matter of the third-party claims of indemnity. Jurisdiction of the federal court over these claims has rested solely on ancillary jurisdiction.

The State overlooks the fact that *Pennhurst* is also distinguishable from the present case on several other grounds. In *Pennhurst*, the plaintiff sought monetary damages and injunctive re-

lief from the federal court. The claim involved an alleged violation of a Pennsylvania *state* statute by state officials. That statute was the Pennsylvania Mental Health and Mental Retardation Act of 1966.

In this case, the Counties are seeking indemnification from the State *under federal common law* for the amount of money damages recovered by the plaintiffs against the Counties. [Jt. App. at 18a-22a.] The violation of law by the State as alleged by the plaintiffs in their Complaint is a federal statute, namely, the Trade And Intercourse Act of 1793. [Jt. App. at 4a-10a.]

The holding of *Pennhurst* was limited solely to a determination that the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law. *Pennhurst, supra*, 104 S. Ct. at 919.

In *Pennhurst*, this Court remanded the case to the Court of Appeals for the Third Circuit to consider whether the judgment of the District Court could be upheld on the federal grounds, namely, the Eighth and Fourteenth Amendments to the United States Constitution, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, upon which the judgment of the District Court rested, or the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6011 and 6063. *Pennhurst, supra*, 104 S. Ct. at 921. Implicit in that holding, this Court has determined that the Eleventh Amendment to the United States Constitution would not be a bar to relief against the state or state officials founded on federal constitutional and statutory bases. In this case, the bases are the Trade And Intercourse Act of 1793 and the federal common law of indemnity. [Jt. App. 192a-193a, 243a-244a, 245a-248a.]

POINT II

THE CONSTITUTIONAL IMMUNITY OF THE STATE OF NEW YORK DOES NOT BAR THE COUNTIES' ACTION FOR INDEMNITY.

In Section B of Point II of its Brief, the State argues that the third-party actions by the Counties of Oneida and Madison are barred by the State's constitutional immunity. State's Brief at 40-45.[1] Placing primary reliance on this Court's decisions in *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Employees of the Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973), the State argues that there is no evidence that Congress intended to permit a suit against the State when it enacted the Trade And Intercourse Act and that, therefore, suit against it is barred. It is respectfully submitted that the State's argument is inapposite.

In the cases beginning with *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), this Court has delineated the boundaries of the Eleventh Amendment immunity enjoyed by the several states. *See Quern v. Jordan*, 440 U.S. 332 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman, supra; Employees of the Department of Public Health and Welfare, supra*. In deciding these cases, this Court has distilled a two-pronged approach in

[1] The State never provides a basis for its claim of immunity, mentioning both the Tenth Amendment and the Eleventh Amendment of the United States Constitution, without relying specifically on either provision. State's Brief at 41. Since the transactions at issue were completed well over a century ago, the present action does not threaten to impair the State's integrity or its ability to function properly in a federal system and does not involve functions essential to its independent and separate existence. *Compare National League of Cities v. Usery*, 426 U.S. 833, 843-846 (1976); *United States v. Best*, 573 F.2d 1095, 1102 (9th Cir. 1978). It is, therefore, assumed that the State relies only on the immunity granted to it in the Eleventh Amendment. *See Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1082-1084 (5th Cir. 1979).

order to determine whether a state's Eleventh Amendment immunity may be overcome.

First, it must be shown that Congress has authorized suit against the states or its instrumentalities. *See Hutto, supra*, 437 U.S. at 693-694 [award of attorneys' fees against the state authorized by Civil Rights Attorneys' Fees Awards Act of 1976]; *Fitzpatrick, supra*, 427 U.S. at 453-456 [congressional authorization to sue the state present in Title VII of Civil Rights Act of 1964 and § 5 of Fourteenth Amendment]; *Parden, supra*, 377 U.S. at 190-192 [suit against the state authorized by congressional enactment of Federal Employers' Liability Act]. It is this authorization that has generally been found lacking in the Court's decisions in *Quern, supra*, 440 U.S. at 342-344 [no authorization in Civil Rights Act of 1871]; *Edelman, supra*, 415 U.S. at 671-672 [state's participation in federally-funded Aid to Aged, Blind, and Disabled Program not sufficient]; and *Employees of the Department of Public Health and Welfare, supra*, 411 U.S. at 285 [no authorization in Fair Labor Standards Act].

The second requirement is that the state being sued must consent to suit in federal court. This consent must be either explicit [*see Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 280 (1959)] or implicit in the state's intrusion into federally regulated spheres of activity for a proprietary purpose [*see Parden, supra*, 377 U.S. at 192; *compare Employees of the Department of Public Health and Welfare, supra*, 411 U.S. at 282-285; *Edelman, supra*, 415 U.S. at 673]. In addition, this "consent" may be contained in the abrogation of certain state powers in favor of those of Congress, which abrogation is necessitated by the nature of the dual state and federal system of government embodied in the Constitution and ratified by the states. *See Fitzpatrick, supra*, 427 U.S. at 454-456; *Hutto, supra*, 437 U.S. at 693-694.

The circumstances underlying the present action indicate that both of the requirements found necessary by this Court have been met. Therefore, the Eleventh Amendment provides no bar to shield the State from liability.

The State's Brief argues that the Trade And Intercourse Act provides no evidence of congressional intent to permit suit against a state in the face of the Eleventh Amendment. The State's position is accurate and is hardly surprising. The Trade And Intercourse Act was first enacted in 1790 [1 Stat. 137] and was enacted a second time in 1793 [1 Stat. 329]. It was on the Trade And Intercourse Act of 1793 that liability in the present action was predicated. [Jt. App. at 215a.] However, the Eleventh Amendment was not even proposed to the states until the Third Congress, when it was proposed on March 4, 1794. *See* Annals of the Congress of the United States, Third Congress at 477 (1849). In light of this historical context, the reasons behind the failure of Congress to address the issue of Eleventh Amendment immunity in enacting the Trade And Intercourse Act become obvious: The Eleventh Amendment had not even been proposed prior to the enactment of the first two Trade And Intercourse Acts. Indeed, prior to the ratification of the Eleventh Amendment, a state was *not* immune from suit. There was, therefore, no reason to discuss the matter in the context of the Trade And Intercourse Acts. *See generally Pennhurst State School and Hospital, supra*, 104 S. Ct. at 906; *Petty, supra*, 359 U.S. at 276; *Chisholm v. State of Georgia*, 2 Dall. 419 (1793); *see also County of Monroe v. State of Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982). The Trade And Intercourse Acts, particularly the 1790 and 1793 Acts, were enacted in a climate in which a suit against a state was permissible. It was not until the ratification of the Eleventh Amendment in 1798 that the issue became a topic of discussion in enacting legislation which might affect the states. Thus, the State's argument that the Trade And Intercourse Acts should not be read "silently to deprive the States of an immunity they have long enjoyed under [the Eleventh Amendment]" is misplaced. State's Brief at 43, *quoting Employees of the Department of Public Health and Welfare, supra*, 411 U.S. at 285. At the time of the enactment of the 1793 Act, no such immunity had been enjoyed by the states, and

therefore, there was no immunity of which to deprive them, silently or otherwise.

Thus, attention must focus on the second prong of the analysis, specifically the State's consent to suit in the federal courts. An examination of the context in which the State of New York dealt with the Indians now before the Court demonstrates that such consent was unequivocal.

Article I, Section 8, of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." Since the adoption of the United States Constitution, it has been established that the power of Congress relating to Indians, particularly as it relates to Indian lands, is supreme. *See e.g., Oneida Indian Nation of New York State, supra; United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1021 (1974).

Congress undertook to exercise this plenary power in 1790 when it enacted the first Trade And Intercourse Act, *supra*. As noted by the Court of Appeals, this enactment was an exercise of federal power which was taken in order to stem the increasing encroachments on Indian property and subsequent retaliatory attacks by disgruntled Indian tribes. [Jt. App. at 210a-212a.] Yet, the State proceeded in the face of both of these Acts and purchased Indian lands in clear violation of the congressional action in this limited field. In September of 1795, two years after the enactment of the Trade And Intercourse Act of 1793 and five years after the original 1790 Act, the State commenced the purchase of land from the Oneidas. [Jt. App. at 31a-35a, 212a.] These purchases took place despite the express opposition of the

federal government. [Jt. App. at 54a-58a.] The State now argues that it should be immune from liability for these activities.[3]

When the states ratified the Constitution, they necessarily agreed to a system of government in which certain powers were ceded to the central government for the common good and the remaining powers were reserved to the states. In so doing, each state relinquished its ability to prevent the federal government from exercising "all its granted powers, though they may interfere with the full enjoyment of rights [the State] would have if those powers had not been thus granted." *Fitzpatrick*, *supra*, 427 U.S. 454-455, *quoting Ex Parte State of Virginia*, 100 U.S. 339 (1880). Congress' power to regulate Indian affairs has been a part of the Constitution since its adoption, and it must be assumed that, in ratifying the Constitution, the State consented to the corresponding diminution of its own ability to engage in Indian affairs. *Fitzpatrick*, *supra*, 427 U.S. at 455-456; *see also Pardee*, *supra*, 377 U.S. at 190-191; *County of Monroe*, *supra*, 678 F.2d at 1132-1133.

Thus, in purchasing lands from the Oneidas, the State intruded into the realm of Indian affairs with full knowledge that

[3]The State also argues that its waiver of immunity should not benefit the Counties herein, but should only provide relief to the Indians from whom the land was purchased. It is respectfully submitted that such an approach is too narrow. The Counties are presently in possession of part of the lands in dispute herein. Were the Indians to sue the State, the State could simply rely on the position that it was not in possession of the land during the period in which damages are claimed. The wrongful act which is alleged by the Indians is directly and solely attributable to the State, which then purported to transfer the land to the predecessors-in-title of the Counties. The damages claimed by the Indians stem from the occupation of the property by the Counties and others; however, the wrong complained of is exclusively the result of the State's activities. Thus, the Counties are entitled to indemnification from the State as a result of the latter's allegedly wrongful conduct. Any other result would force the Counties, who are innocent of any wrongdoing, to bear the brunt of the State's unlawful activities.

its activities were subject to federal regulation. The State must, therefore, be deemed to have waived any objection it might have to the exercise of the Court's jurisdiction over it. *Pardee*, *supra*, 377 U.S. at 192-193.

Even were the State not held to have waived its immunity, the enactment of the Trade And Intercourse Acts under the plenary power reserved to Congress by Article I, Section 8, of the Constitution evidences a clear and unequivocal intention by Congress to abrogate the State's immunity in favor of a national policy on what was once an issue vital to the survival of the United States. [Jt. App. at p. 112-113a.] *See Hutto*, *supra*, 437 U.S. at 693-694; *Fitzpatrick*, *supra*, 427 U.S. at 456; *County of Monroe*, *supra*, 678 F.2d at 1132-1133; *Peel*, *supra*, 600 F.2d at 1080-1081; *Mills Music, Inc. v. State of Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979); *Jennings v. Illinois Office of Education*, 589 F.2d 935, 942-943 (7th Cir. 1979).

Nor is this Court's decision in *Employees of the Department of Public Health and Welfare*, *supra*, to the contrary. In *Employees*, the Court refused to hold that the State of Missouri Department of Public Health and Welfare was subject to liability under the provisions of the Fair Labor Standards Act. The Court relied on the fact that, in enacting the Fair Labor Standards Act, Congress did not specifically lift the state's Eleventh Amendment immunity. In addition, the Court noted that the state's mental hospitals, cancer hospitals, and training schools, which were established long prior to the enactment of the Fair Labor Standards Act, were not operated for a profit. As noted *supra*, there was no discussion of the Eleventh Amendment when the Trade And Intercourse Acts were enacted because the Eleventh Amendment had not been proposed at the time of either the 1790 or the 1793 Act. In addition, the State's argument that the acquisition of Indian land was not a proprietary function is disingenuous in light of the substantial profits reaped by the State in reselling the same land. Within two years, the State had resold the land for more

than seven times what it had paid for the land. [Jt. App. at 213a.] *See Mills Music, Inc., supra*, 591 F.2d at 1286. Finally, unlike the defendant in *Employees*, the State had a choice as to whether or not to enter into land transactions with the Indians. The present action did not involve a situation in which the State had no notice that its proscribed activities might result in liability. *Compare Edelman, supra*, 415 U.S. at 674; *Employees of the Department of Public Health and Welfare, supra*, 411 U.S. at 285. Rather, the State was "truly free to decide whether or not to consent to suit in federal court." *County of Monroe, supra*, 678 F.2d at 1134. Had it not wished to expose itself to liability, it needed only to forego its option to engage in federally-regulated land acquisitions from Indians. The choice was clear. The State should not now be heard to claim that its decision was the wrong one.

POINT III

THE COUNTIES ARE ENTITLED TO INDEMNITY UNDER NEW YORK SUBSTANTIVE LAW FROM THE STATE OF NEW YORK.

The State argues in Section C of Point II of its Brief that the New York law of real property limits the Counties' remedy to the return of the original purchase price of the property without interest. The State characterizes the Counties' actions against it as essentially an attempt to imply a warranty of title for the conveyance of real property by the State. The State then reads New York law as precluding any implied covenant of title. Finally, the State concludes that the only available remedy for the failure of title to lands patented by the State is that provided by New York Public Lands Law § 6. None of the authorities cited by the State involve land acquired from a dependent Indian Nation in violation of federal law, a circumstance that is clearly *sui generis* and so far removed from the usual world of real property transactions as to preclude any useful analogy.

The chief weakness of the State's position is in its misleading premise.[1] The Counties' actions against the State sound in tort and are quasi-contractual in nature. They seek indemnity from the State whose wrongdoing exposed the innocent Counties to liability. Insofar as New York law precludes the establishment of implied covenants in conveyances of real property, it simply has no application to the case at bar. The rule relied upon so heavily by the State clearly contemplates an arms-length sale of real property where the grantee can protect itself by requiring covenants in the deed. New York Real Property Law § 251 (McKinney's 1968); *Burwell v. Jackson*, 9 N.Y. 535, 546 (1854).

The action before the Court is of an entirely different nature from that contemplated by the rule precluding implied covenants. Here, the State has been found to have violated a federal statute protecting aboriginal Indian interests in land, as a result of which two innocent Counties in no way involved in the original underlying transaction are made to bear the burden of the plaintiffs' recovery. It is nothing short of simple equity to hold that the Counties, which are being made to discharge a duty that should rightfully be discharged by the State, are entitled to indemnity from the State. *See McDermott v. City of New York*, 50 N.Y.2d 211, 217 (1980), *motion for reargument denied*, 50 N.Y.2d 1059 (1980). It is to avoid inequity and to prevent unjust

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[1] A misleading premise is not the only weakness of the State's position. The cases relied upon by the State involve either transfers of deeds between individuals or title deriving from tax sales and can have no application to the problem before the Court. Moreover, while the State's citation of *People ex rel. Ostrander v. Chapin*, 109 N.Y. 177 (1888), indicates that the case involved letters patent, the actual issue dealt with the refund of the purchase price as an invalid tax sale. There was no question or discussion of patents in the case.

enrichment that the concept of indemnity has developed. *Id.* Both would surely result if the State were permitted to place the burden of its wrongdoing upon the Counties.[*]

It is the unquestioned rule in New York that "one who has discharged a duty owed by him but which, as between himself and another, should have been discharged by the other, is entitled to indemnity from the other." 23 N.Y. Jur.2d, "Contribution, Indemnity and Subrogation" § 62 (1982). *See also McDermott, supra; Mauro v. McCrindle*, 70 A.D.2d 77, 81 (2d Dep't 1979), *aff'd on op. below*, 52 N.Y.2d 719 (1980); Restatement of Restitution § 76. Although the right to implied indemnification recognized by the courts below is quasi-contractual in nature, it "exists independently of any special relationship or duty and rests instead on the parties' relative responsibility as determined on the facts as a whole." *Mauro, supra*, 70 A.D.2d at 83.

The long history of implied indemnification reflects "an equitable abhorrence of unjust enrichment," together with the vindication of the fundamental principle that every wrongdoer is responsible for the consequences of his own acts. *Id.*, 70 A.D.2d at 80. *See also Dunn v. Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 217 (1903); *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 467-468 (1892); *Village of Port Jervis v. First National Bank*, 96 N.Y. 550, 555-556 (1884). New York's adherence to this fundamental principle of justice has

[*] The State is also in a far better position than the Counties to bear the burden of the possible losses risked by litigation of this type. It is clear that whatever governmental subdivision is made to pay the monetary claims advanced by the various Indian plaintiffs, it is the taxpayer who will ultimately have to pay. Some idea of the relative ability of the Counties and the State to generate the revenue required to pay a substantial award can be derived from a comparison of the most recent population statistics. While New York State has a population of 17,557,288, Franklin County has a population of 44,929 and St. Lawrence County has a population of 114,284. Bureau of Census, U.S. Dep't of Commerce, 1980 Census of Population 1 (1983).

been recognized by the federal courts. Thus, it has been observed that "New York courts have consistently held that indemnity rests upon the principle that the true wrongdoer should bear the ultimate burden of payment." *Ross v. Penn Central Transportation Company*, 433 F. Supp. 306, 309 (W.D.N.Y. 1977).

Application of these principles to the case now before the Court clearly supports the determination of both Courts below that the theory of implied indemnification, as developed in New York, demands that the State bear the ultimate burden of payment to the plaintiffs.[*] The District Court, having been exposed directly to the proof at trial, concluded, in essence, that the State knowingly and willfully violated the Trade And Intercourse Act of 1793 in its acquisition of the land of the Oneida Nation. [Jt. App. at 54a-58a.] Since it is the State that violated federal law, thereby creating the claim now before the Court, simple justice requires that the State be made to accept the full responsibility for its wrongful act. The decision of both Courts below avoids the inequitable result of unjust enrichment and places the monetary burden of plaintiffs' recovery where, in fairness, it ought to come to rest — upon the State. The Counties are being compelled to directly discharge a duty owed the plaintiffs which, as between the Counties and the State, should be discharged by the State. As both Courts below recognized, a simple application of the principles underlying implied indemnification leads to the conclusion that the State indemnify the Counties for all damages recovered by the plaintiffs.

[*] The federal District Court characterized the Counties' claims against the State as claims for indemnity "fashioned in the mode of the Federal common law" [Jt. App. at 193a.] The Court applied the equitable principles of indemnity so as to avoid unjust enrichment and to place the burden of the loss on the State, which is the only party found to have violated federal law. [Jt. App. at 191a-192a.] The Court of Appeals upheld the Counties' third-party action for indemnity, quoting and citing controlling New York law on the issue. [Jt. App. at 244a-245a.]

CONCLUSION

If it is not reversed on the grounds presented by the Counties of Oneida and Madison, New York, in the appeal, the Order of the United States Court of Appeals for the Second Circuit should be affirmed with respect to the finding of liability of the State of New York for indemnification of the Counties of Oneida, New York, and Madison, New York.

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BRIEF

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Nos. 83-1065, 83-1240

In The

Supreme Court of the United States

October Term, 1983

THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK,

Petitioners,

vs.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A The Oneida Nation of New York, A/K/A The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Respondents.

BRIEF OF RESPONDENTS ONEIDA INDIAN NATION OF WISCONSIN AND ONEIDA INDIAN NATION OF NEW YORK

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Nos. 83-1065, 83-1240

In The
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October Term, 1983

THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK,

Petitioners,

vs.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A The Oneida Nation of New York, A/K/A The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Respondents.

BRIEF OF RESPONDENTS ONEIDA INDIAN NATION OF WISCONSIN AND ONEIDA INDIAN NATION OF NEW YORK

STATEMENT OF THE CASE

From time immemorial until 1795, the Oneida Nation occupied the real property that is the subject of this suit. This property, part of the Oneida Nation's aboriginal territory, was secured to it by federal treaties in appreciа-

tion for the invaluable assistance given the United States by the Oneida Nation during the Revolutionary War. Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty of Fort Harmar, Jan. 9, 1789, 7 Stat. 33. A smaller part of Oneida territory, including the subject land, was recognized as Oneida property by the United States in a third treaty. Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44. In 1795, the State of New York purported to purchase the subject property without the consent of the United States in violation of the 1793 Indian Trade and Intercourse Act, 1 Stat. 329 (referred to hereinafter as the 1793 Act). 434 F. Supp. 527, 533-35.

In 1970, the Oneida Indian Nations of New York and Wisconsin filed this action based on the 1793 Act and federal treaties challenging the 1795 transaction. They were joined later in the proceeding by the Oneida of the Thames Band. The Oneida plaintiffs (hereinafter the Oneidas) sued only Madison and Oneida Counties, New York (hereinafter the counties) and sought only two years' trespass damages for the 871.92 acres occupied by them as successors to New York State. No private parties were sued and eviction was not sought.

The district court dismissed the suit for lack of federal question jurisdiction and in a split decision the Court of Appeals for the Second Circuit affirmed. 464 F.2d 916 (Lumbard, J., dissenting). This Court reversed in a unanimous decision, holding that federal question jurisdiction here rests on the "not insubstantial claim" that federal law protects the Oneidas' interests in the subject land. 414 U.S. 661, 666 (hereinafter *Oneida* I).

On remand, the counties filed third party complaints against New York State (hereinafter the state), seeking

indemnity for any trespass damages that might be awarded against them. The district court divided the case into three separate proceedings: the first on the counties' liability to the Oneida tribes, the second on the amount of damages owed if any by the counties to the Oneidas, and the third on the counties' claim for indemnity from the state.

After trial on the primary liability issue, the district court held that the three tribal plaintiffs were the political successors to the Oneida Nation and had not abandoned the claim. 434 F. Supp. at 532, 541. The court concluded that the state had violated the 1793 Act, that the transaction was, as a result, void, and that the counties as the state's successors in interest had illegally occupied Oneida land. *Id.* at 540.[1] The counties raised a number of defenses such as laches and adverse possession all of which were rejected by the district court. *Id.* at 541-43.

The district court then tried the damages issue and held the counties liable to the Oneidas for $16,654.00, plus interest, in total trespass damages, allowing the counties an offset for claimed good faith occupancy. On the remaining issue—the counties' third party claim against the state—the district court held the state liable to indemnify the counties for the full amount of the Oneidas' judgment. J.A. 188a-190a.

On appeal, the Second Circuit affirmed the district court's judgment with one exception. 719 F.2d 525. Finding that the counties had not proffered evidence of their

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[1]The district court based its liability finding on the statute and did not reach the Oneidas' treaty claim. 434 F. Supp. at 537, n.19. That claim remains unadjudicated.

claimed good faith occupancy for the two years in question, the court of appeals remanded the good faith issue to the district court for clarification. *Id.* at 542. The remand was stayed pending this Court's consideration of the counties' and state's petitions for certiorari.[1] On March 19, 1984, the Court granted both petitions and the good faith issue remains undetermined.

SUMMARY OF THE ARGUMENT

In large part, the questions raised in the petitions for certiorari are answered by recent decisions of this Court and acts of Congress. In *Oneida* I the Court examined the nature of the Oneidas' claim. It held that for purposes of federal question jurisdiction the Oneidas asserted a federally protected property right arising from unodified principles of federal law, federal treaties and statutes. 414 U.S. at 667-68, 678. The Court further determined that, with respect to any issue here not governed by federal statute, the "rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. The Court's reasoning plainly suggests the existence of a federal common law and statutory right of action in the Oneidas.

The suggestion in *Oneida* I that tribes could sue on federal common law and statutory actions to protect tribal land became the implicit holding in *Wilson v. Omaha Indian Nation*, 442 U.S. 653 (1979). Invoking the same sort of federal protections as had the Oneidas, the Omaha Tribe

[1]Since the counties abandoned both the laches and abandonment defenses on appeal, the court of appeals did not consider those issues. The counties raised only the four issues that were the subjects of their petition for certiorari, *i.e.* availability of federal common law remedies, the existence of a statutory right of action, the statute of limitations bar, and justiciability.

sued to quiet title. *Id.* at 659-661. The Court reviewed the tribal claim on its merits and, referring to the principles set out in *Oneida* I, upheld the cause of action and the tribe's right to relief. *Id.* at 670-71. Thus, in *Wilson* the Court tacitly held that tribes have a right of action under federal common law and statutory law to protect tribal lands.

Congress has confirmed the availability of relief on tribal claims respecting land. In the Indian Trade and Intercourse Acts, Congress codified the principle that tribal lands cannot be alienated without the United States' consent (referred to herein as the nonintercourse provision). In 1822, Congress enacted a statute allocating the burden of proof in land disputes between tribes and non-Indians. *See* 25 U.S.C. §194. In 1966, Congress provided that tribes shall have access to federal court in such suits. *See* 28 U.S.C. §1362. Since 1966, Congress has passed a number of statutes of limitation dealing with damages in such suits and specifically exempting title claims. *See* 28 U.S.C. §2415. Section 2415 is applicable here and, thus, precludes adoption of a state statute of limitations. Congress has thus effectively authorized tribal actions in federal court to vindicate tribal property rights.

The same acts of Congress and decisions of this Court discussed above also reflect an assumption that this case is justiciable. Although based on federal common law and federal statutes, the suit is a simple title action: "Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession." *Oneida* I, 414 U.S. at 663 (Rehnquist, J., concurring). As such, the issues here are not constitutionally committed to the political branches of government and are not barred by any policy determination of those branches.

Congress at no time ratified the illegal transaction. The record here contains no evidence that the Congress had the 1795 transaction before it when it ratified the 1790 and 1802 state treaties or that the Congress was even aware that the two later state treaties referred indirectly to the 1795 transaction. Under principles established by this Court, ratification of the 1795 transaction cannot be implied from Congress' approval of the two later treaties.

The counties and state admit that the Oneidas owned the subject property in 1795. They admit that the Oneidas lost possession of the subject property in violation of federal law. Finally, they admit that the United States could obtain on the Oneidas' behalf the same relief the Oneidas seek in this action. There is no sound reason in principle or precedent to deny that relief to the Oneidas.

ARGUMENT

Introduction

In an effort to produce a result which cannot be supported by legal precedent, the counties raise the spectre of massive dislocation and bankruptcy of innocent property owners ensuing from this and other eastern land claims cases. County Petitioners' Br. 10-12. Such consequences have not occurred and cannot in this case.[2] Even were this controversy defined by the relief prayed for in other cases rather than that actually awarded here, the counties'

[2]Eviction was not sought by or awarded to the Oneida parties in this case. Trespass damages were sought from only municipal owners, not private parties, and then in only modest amounts. Whether private parties can be evicted or trespass damages assessed against them remains to be determined in future litigation. In such a suit, the lower courts could consider any countervailing equities of private parties and those parties could seek review in this Court with a well-developed record on those issues.

inflammatory description of these cases and their likely consequences bears little resemblance to reality.[4] Effective judicial and political restraints on these cases exist.

In the few cases where courts have considered the remedy issues,[5] they have uniformly determined that any relief awarded will be informed by equity considerations. As Judge Port observed here, the punishment in these

[4]The suggestion that economic disruption has occurred in New York State as a result of the mere pendency of this and other claims is unsubstantiated in the record. It is also untrue. Congressman Gary Lee, whose congressional district included a large part of the Oneida claim area, said in 1982:

> Mr. Chairman, fortunately in the State of New York, we have not had the economic injury that occurred, for example, out in Cape Cod in the *Mashpee* case. At this point I think we can say with a reasonable level of confidence that the transferring of homes, or properties, other exchanges of property, has taken place normally. The FHA, the VA, other banking institutions, have been able to transfer property without difficulty. The bonding of sewer districts, water districts, other public buildings, has occurred under normalcy.

Ancient Indians Land Claims Settlement Act of 1982; Hearing on S.2084 Before the Senate Select Committee on Indian Affairs, 97th Cong., 2d Sess. 24 (1982) (Statement of Representative Lee).

[5]In most of the cases, the tribal plaintiffs have not as yet proved their case on liability. The plaintiffs carry a substantial burden of proof on that score. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378-80 (1st Cir. 1975); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977). Some plaintiffs have already failed in their burden of proof on liability and their claims have been dismissed. *See, e.g., Mashpee*, 592 F.2d 575 (1st Cir. 1979), *cert. denied* 444 U.S. 866 (dismissed for failure to prove tribal existence); Chitimacha Tribe of Indians v. Harry L. Laws, 690 F.2d 1152 (5th Cir. 1982), *cert. denied* 104 S.Ct. 69 (dismissed for reason of confirmation of Congress). Those same defenses have been raised in other suits but are unadjudicated.

cases should be tailored to fit the crime. J.A. 166a; *see also Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1310-11 (N.D.N.Y. 1983):

> Should plaintiffs ultimately prevail, equitable factors will be carefully weighed before any relief is granted. *See, Oneida v. New York, supra*, 510 F. Supp. at 1296. And, as stated previously in the discussion of justiciability, any such relief will be fashioned with the utmost restraint.

Accord, Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1083 (2nd Cir. 1982). No single landowner, public or private, has been evicted or bankrupted in any of these cases and the law has developed in such a way that that result is unlikely.

More importantly, Congress and the parties in a given case can forestall such a result by a legislative settlement. Four such settlements have been enacted thus far. *See* 25 U.S.C. § 1701 et seq. (Narragansett settlement); 25 U.S.C. § 1721 et seq. (Maine settlement); 25 U.S.C. § 1741 et seq. (Florida/Miccosukee settlement); 25 U.S.C. § 1751 et seq. (Connecticut/Mashantucket Pequot settlement). In addition, a settlement agreed to by the parties in the *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, 74-5826-MeN (D. Mass.) is now pending in Congress. *See* H.R. 5491, 98th Cong., 2d Sess., 130 Cong. Rec. H2946 (1984). Given the number of parties involved and the complexity of these claims, it is remarkable that in only the ten years since federal court jurisdiction over the claims has been established, nearly a half dozen of the claims have been settled by the parties.

Even were the parties in a particular case unwilling or unable to agree upon settlement terms, an ultimate

check on the claims exists. Congress asserts the power to unilaterally dispose of the cases by extinguishing or taking the Indians' claims. In 1982, for example, Congressman Gary Lee of New York introduced a bill that would extinguish tribal land claims in New York State and South Carolina. H.R. 5494, Ancient Indian Land Claims Settlement Act of 1982, 97th Cong., 2nd Sess.; introduced in the Senate by Senator D'Amato as S. 2084.[6] The bill was not enacted in part because Congress was not convinced that the normal process of negotiations among the parties should be aborted. *See, e.g.*, Remarks of Committee Chairman, House Interior and Insular Affairs, at Hearings on H.R. 5494, June 22, 1982, Tr. 3. However, these cases are clearly under Congress' watchful eye. There can be no doubt that should the parties prove intransigent or economic hardship develop, the Congress would act.[7]

In light of the restraints on these claims, the counties' protestations are fantastical. True, the claims are large. But the enormity of the claims reflects the enormity of the wrongs done to Indian tribes by the eastern states.

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[6]The Oneidas do not concede that such a bill would withstand constitutional scrutiny. Indeed, the Oneidas opposed the 1982 bill on the grounds, *inter alia*, of its unconstitutionality. But the bill and the hearings held on it show Congress' continuing interest in these cases.

[7]The Lee bill, and in all likelihood any unilateral extinguishment or taking of the claims, would not provide the tribal plaintiffs with a land base, but money damages only. For that reason, tribes have generally opposed unilateral congressional resolution of the claims, preferring instead negotiated settlements which provide for the return of some amount of land. Tribes pursue negotiated settlements in these cases with full awareness of the power claimed by Congress to extinguish or take the claims.

Despite this historic truth, neither the federal courts nor the Congress has indicated a willingness to exact or allow a comparable price in these cases from the public defendants, and most certainly not from the private defendants. "Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed." *Oneida Indian Nation v. State of New York*, 691 F.2d at 1083.

I. The Oneidas Have A Cause Of Action For Trespass Maintainable Under The Federal Common Law

The lower courts properly recognized a federal common law right of action in the Oneidas to recover trespass damages from the counties. *See* H. Hart and H. Wechsler, *The Federal Courts and the Federal System* 773 (2nd ed. 1973) where the authors cite relations between the Indians and the United States as one of the subjects of federal common law.[8] The property right recognized by

[8]As such, the Oneidas' property rights are consistent with this Court's jurisprudence of federal common law. As Justice Jackson has explained,

> The Federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind . . . But this is not to say that whereever we have occasion to decide a Federal question which cannot be answered from Federal statutes alone we may not resort to all the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law . . .

D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 469 (1942) (Jackson, J. concurring). Such is the case here. Congress has codified important principles respecting tribal property rights (see, e.g., 25 U.S.C. §177) and taken steps to preserve the tribes' property rights (see, e.g., 28 U.S.C. §§1362, 2415; 25 U.S.C. §194). But Congress' endeavors in the area are piecemeal. Because the complete answer cannot be found in federal legislation, this Court has fashioned federal common law remedies to vindicate tribal property rights.

them is a unique one which in its nature and extent is defined exclusively by federal law. It is a right long recognized by this Court and one which the Oneidas unquestionably have capacity to invoke.

A. The Oneidas' property rights are founded in federal common law.

Tribal property rights originate with the founding of this country. Chief Justice Marshall, writing in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), explained those rights at length:

> They [Indians] were admitted to be the rightful occupants of the soil, *with a legal as well as a just claim to retain possession of it*, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and *their power to dispose of the soil at their own will, to whomsoever they pleased, was denied* by the original fundamental principle [of] discovery . . .

Id. at 574 (emphasis added). The doctrine of discovery was the basic premise of all "discovering" nations' relations with Indian tribes and was often repeated in treaties. *Id.* at 586-87.

The United States acceded to the doctrine of discovery, recognizing the tribes' "unquestioned right" to exclusive possession of their lands.[9] *Cherokee Nation v. Geor-*

[9]The doctrine of discovery also implicated the United States' relations with foreign nations. The possibility of foreign meddling on this continent via Indian tribes was a real concern of the United States in 1776, as it had been before with Great Britain. F.P. Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Acts of 1790-1834*, 8-16 (1962). By vesting exclusive authority over relations with tribes in the United States, the doctrine of discovery served a classic federal interest in foreign affairs at the same time it outlined tribal property rights. See Cherokee Nation v. Georgia, 30 U.S. at 67-68.

gia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Oneida I*, 414 U.S. at 669; *Jones v. Meehan*, 175 U.S. 1, 8-9 (1899); *Butte v. Northern Pacific R.R. Co.*, 119 U.S. 55, 68 (1886); *Leavenworth, Etc. R.R. Co. v. United States*, 92 U.S 733, 742 (1876); *Holden v. Joy*, 84 U.S. 211 (1872); *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839); *Lattimer v. Poteet*, 34 U.S. (14 Pet.) 4 (1840); *Fletcher v. Peck*, 6 Cranch 87 (1810).[10] Those rights were not unconditional. With their earliest recognition, tribal property rights were held inalienable to any party other than the United States. *Wilson v. Omaha Indian Tribe*, 442 U.S. at 671; *Oneida* I, 414 U.S. at 666, 678.[11] Therefore, all elements of the Oneidas' cause of action can be found in federal common law.

In many of its "almost countless" decisions on the subject (*Oneida* I, 414 U.S. n.5), this Court has given legal effect to tribal property rights in civil litigation. In *Johnson v. M'Intosh*, *supra*, the Court declared invalid two private purchases of Indian land made in 1773 and

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[10]The common law at the time held that a right to land included "the right to enter on it when the possession is withheld from the rightful owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it." Green v. Biddle, 21 U.S. (8 Wheat.), 1, 75-76 (1823). The Oneida parties in this action have, of course, eschewed the right to recover possession and sought only damages for the counties' illegal use and occupancy. The federal common law right to recover possession clearly includes the lesser right to damages. See, e.g., Bunch v. Cole, 263 U.S. 250, 254 (1923), where the Court determined that an Indian allottee was entitled to money damages for illegal use and occupancy of restricted allotment; see also United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976).

[11]Thus, the nonintercourse provision simply "put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States." *Oneida* I, 414 U.S. at 678.

1775 without the Crown's consent. In *Marsh v. Brooks*, 49 U.S. 223, 232 (1850), the Court held, "That an action in ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in *Johnson v. M'Intosh* . . ." *See also Lattimer v. Poteet*, *supra*, where the Court acknowledged the legal efficacy of Indian occupancy rights as of 1783; *Clark v. Smith*, *supra* at 201, where the Court observed that both federal and state courts had uniformly respected the Indians' right of occupancy.[12] It cannot be seriously doubted at this late date that the federal common law has long provided remedies to vindicate tribal property rights.[13]

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[12]The counties observe that many of these early cases were filed in state court and none of them involved a tribal plaintiff. County Petitioners' Br. n.21. Those observations are correct, but do not disprove the existence of a federal common law cause of action in tribes. Since tribes clearly have capacity to sue, the identity of the party plaintiffs in those cases is irrelevant. *See* I B, *infra*. In addition, the federal nature of an action is not altered simply by virtue of being filed in state rather than federal court. Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring). Therefore, these cases are solid authority for the proposition that Indian property rights have been cognizable under federal law since the early days of the Republic.

[13]The counties argue that a federal common law right of action such as that sued upon by the Oneidas has never been recognized by this Court. As the above discussion demonstrates, that argument is false. Even had the right of action never been recognized before, the two reasons given by the counties as to why one should not be created now are unpersuasive. First, the counties claim that the Indian Claims Commission could have vindicated the Oneidas' rights here. County Petitioners' Br. 26. But the Indian Claims Commission had jurisdiction over money claims against the United States only, not over title claims. *See* Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955); *see also* dis-

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B. Indian tribes have capacity to vindicate their property rights directly.

The counties and state maintain that the Oneidas lack capacity to sue on federal common law rights respecting tribal property that may have existed in 1795. County Petitioners Br., 25; State Petitioner's Br. 12-13. That proposition has been put to rest by this Court and Congress.

In *Lane v. Santa Rosa*, 249 U.S. 110 (1919), a pueblo sought to enjoin the Secretary of the Interior from disposing of pueblo lands under public land laws. Relying on *Cherokee Nation v. Georgia, supra*, the Secretary challenged the pueblo's capacity to sue. The Court rejected the Secretary's reading of *Cherokee Nation v. Georgia* and upheld the tribe's capacity to sue. *Lane v. Santa Rosa, at* 113. Similarly, in *Creek Nation v. United States*, 318 U.S. 629, 640 (1943), the Court observed that tribes have their own "independent remedy for wrongs done them . . . as a general legal right . . ." And again, in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1968), the Court held, referring to *Creek Nation, infra*, ". . . that the right of the United States to institute a suit to pro-

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cussion *infra*, p. 47. Second, the counties point to "a matter of high policy" implicated in re-establishing Oneida sovereignty of the claim area. County Petitioners' Br. 27. Whatever that phrase may mean, the argument proves too much. It is undisputed that the United States could pursue the same common law remedy sought by the Oneidas without running afoul of such a bar. Assuming *arguendo* the right does not already exist, there is no reason not to create federal common law remedies on behalf of the Oneidas.

tect the allotment did not diminish the Indian's right to sue on his own behalf."[14]

Were there any doubt on the matter after those decisions, Congress removed it in 1966 with the enactment of P.L. 89-635. Act of Oct. 10, 1966, 84 Stat. 880 (codified at 28 U.S.C. § 1362). That statute extends federal district court jurisdiction over

> . . . all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Id.[15] This Court has already determined in *Oneida* I that this suit, filed by the Oneida tribes after the enactment of § 1362, raises federal questions. By express act of Congress, then, the Oneidas have capacity to pursue their federal common law property rights.[16]

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[14]Overlooking these precedents, the counties and state cite Jaeger v. United States, 27 Ct. Cl. 278 (1892), as authority for their argument that tribes can sue only when specially authorized by Congress. County Petitioners' Br. 21; State Petitioner's Br. 11-12. However, *Jaeger* refers only to suits by tribes against the United States in the Court of Claims. *See Jaeger* at 285. The special jurisdictional history of tribal claims against the United States is well known to this Court. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 384 (1980). This suit is not against the United States and is not governed by those rules. *See* discussion of 28 U.S.C. §1362, *infra* page 40.

[15]Two of the three Oneida parties in this litigation—the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin—are recognized by the Secretary of the Interior. *See* 48 Fed. Reg. 56862, Dec. 23, 1983.

[16]Many of the claims litigated by tribes under §1362 arose well before passage of the act. For example, the Puyallup Tribe sued third parties under §1362 on a title claim based on

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C. *The 1973 Act left the Oneidas' federal common law remedies intact.*

As is clear from the discussion above, the federal common law affords tribes substantial remedies to protect tribal property rights. The counties and state respond that those federal common law remedies were preempted by statutory penalties enacted as part of the 1793 Act. Relying primarily on the presence of a specific misdemeanor added to the nonintercourse provision in 1793, they construe the Act as so comprehensive as to preclude all other non-statutory remedies. County Petitioners' Br. 27-30; State Petitioner's Br. 13-19. The argument falls under the weight of the statute's language to the contrary and decisions of this Court construing other statutory restraints on alienation of Indian land.

The pre-emptive effect of a federal statute on federal common law is an issue of statutory construction. The specific inquiry is whether the federal legislation speaks "directly to a question" that would otherwise be answered by reference to the federal common law. *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). Since the counties' and state's arguments depend upon the 1793 additions to the 1790 Indian Trade and Intercourse Act, the review of statutory language must begin with the 1790 act.

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1854 and 1855 treaties and an 1857 Executive Order. Puyallup Tribe v. Port of Tacoma, 525 F. Supp. 65 (W.D. Wash. 1981), *aff'd* 717 F.2d 1251 (9th Cir. 1984), *cert. denied* 104 S.Ct. 7324 (1984). Similarly, the Omaha Tribe invoked §1362 for title claims based on river movements between 1867 and 1927. Wilson v. Omaha Indian Tribe, 442 U.S. at 659.

The capacity of the tribal plaintiff was not questioned in any of these proceedings. Section 1362 cannot be construed, then, as opening the federal courthouse doors only to claims accruing before its passage.

In its seven sections, the 1790 act dealt with a number of discrete and long-standing concerns in the administration of Indian affairs. 1 Stat. 137, Act of July 22, 1790; *see generally*, F.P. Prucha at 44. Sections one, two and three regulated trading with Indian tribes. Section four dealt with the purchase of tribal lands and declared that no such purchase shall be valid unless done under authority of the United States. Section five addressed the problem of settlements on and commission of crimes in Indian territory by non-Indians. In its only provision of general applicability, section six of the act authorized the prosecution of offenders for violation of any part of the act: "[T]hat for any of the crimes or offenses aforesaid, the like proceeding shall be had . . . as . . . are directed for any crimes or offenses against the United States."[17]

The 1793 Act carried forward the substantive provisions of the 1790 act. 1 Stat. 329. Its fifteen sections included new substantive provisions and added more enforcement mechanisms to some of the carryover provisions. The nonintercourse provision, section eight of the 1793 Act, remained primarily a declaratory section, but with two changes. First, it contained the additional language that unauthorized transactions shall have no validity "in law or equity." Second, it specified a penalty of a fine not exceeding one thousand dollars and imprisonment up to twelve months for the violation of the section, previously punishable in the 1790 act without reference

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[17]Thus, the counties' assertion that the 1790 act contained no remedy for violation of the nonintercourse provision is incorrect. See County Petitioners' Br. 28-29.

to a specific fine or imprisonment term.[16] Three new sections of the 1793 Act specified further details regarding the prosecution of the "crimes, offenses or misdemeanors" described in the act. *Id.*, sections 10, 11, 12. Those new sections did not criminalize any acts not made punishable in the preceding substantive provisions or authorize additional penalties for violations of those sections. Thus, the only remedy available for violation of the 1793 nonintercourse provision was the fine and term of imprisonment specified in section eight, a penalty which differed from that in the 1790 act only in its express limitations.

Two conclusions can be drawn from this review of the statutory language. First, the 1793 Act had no greater pre-emptive effect than the 1790 act. The only significant addition made in 1793 to the nonintercourse provision is the reference to "law and equity." Use of those terms clearly indicates that Congress anticipated legal proceedings respecting attempted transfers of Indian lands. The specific penalty added in 1793 cannot be considered significant. Under section six of the 1790 act, exactly the same penalty could have been imposed for violation of the nonintercourse provision. Since the 1790 act did not pre-empt federal common law remedies, neither can the 1793 Act be construed as pre-emptive. *See* County Petitioners' Br. 17-18.

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[16]The misdemeanor penalty was imposed on any person negotiating with tribes for the purchase of land, regardless of whether the negotiation resulted in an actual purchase. It punished those who purported to exercise authority committed exclusively by the Constitution to the United States, *i.e.* treaty making with Indian tribes. *See* U.S. Const., art. I, sec. 8, cl. 3; art. II, sec. 2, cl. 2. The declaratory language of the provision applied only to consummated transactions.

Second, the 1793 Act did not speak directly to the issue of tribal remedies for violation of the nonintercourse provision. No provision at all was made for civil suits by tribes, for tribal enforcement of the single criminal penalty specified for illegal land transactions, or for tribal participation in any fines collected under the nonintercourse act.[17] Furthermore, the act made no mention of civil suits by any party plaintiff to set aside transactions that violated the nonintercourse provision. The counties concede that the 1793 Act did not pre-empt common law remedies previously available to the United States, even though the act made criminal penalties available to the United States. County Petitioner's Br. 32-34. It would seem *a fortiori* that the Act did not pre-empt tribal suits since Congress did not speak to that question at all. *See Milwaukee*, *supra* at 315.[18]

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[17]The 1793 Act did not explicitly create an informant's suit. It simply specified that any fines or forfeitures would be divided between any informant and the United States. 1 Stat. at 330. In some substantive provisions, the 1790 act did the same. See, e.g., 1 Stat. 137, §3. It would appear, then, that both statutes implicitly authorized informants suits to enforce the criminal penalties. See County Petitioners' Br. 29.

[18]The counties attempt to avoid this conclusion by suggesting that the penalties specified in other substantive provisions of the Act, primarily the President's authority to remove illegal settlers, could be invoked to remedy a violation of the nonintercourse provision. County Petitioners' Br. 29. There is nothing in the statutory language or legislative history to support this suggestion. In fact, the historical evidence is to the contrary. After 1793, the President frequently exercised his authority to remove illegal settlers who had no claim of title to Indian lands. F.P. Prucha at 147-185. But there is no evidence that the President ever invoked that authority to remove settlers who asserted paper title to the land obtained in violation of the nonintercourse provisions. Certainly, the mere existence of en-

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Even though the 1793 Act contained no provision for tribal suits, the counties and state argue that the statute was intended to be comprehensive and, as such, displaces all other remedies. They point to the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), construed in *Milwaukee*, *supra*, as pre-emptive, as an example of such a statute. County Petitioners' Br. 28-29; State Petitioner's Br. 13.[21] A comparison of the two statutes demonstrates the error of their construction of the 1793 Act.

As printed in the *Statutes at Large*, the FWPCA covers approximately seventy-four pages and deals with all aspects of the subject. Pub. L. No. 91-500, 86 Stat. 816 (codified at 33 U.S.C. §1361 et seq.) (1972). It contains two separate enforcement sections, one governing suits by the federal government and another authorizing citizen suits. Section 309 describing remedies available to the federal government identifies the substantive sections which the government can use to enforce, prescribes in

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forcement mechanisms attached to other substantive provisions will not support a finding of pre-emption. See Wilson v. Omaha Tribe, 442 U.S. at 666, where the Court noted the penalties referred to by the counties and upheld a tribal suit for quiet title.

[21]The state also invokes a presumption favoring pre-emption of federal common law remedies where the statute is comprehensive. See State Petitioner's Br. 17-19. As we demonstrated in this section of the brief, the 1793 Act is not comprehensive. Even if it were, no such presumption is available here. The canons of construction applicable to Indian statutes preclude operation of that presumption where it would diminish or restrict tribal rights. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

detail the notice that must be given a violator and the affected State before suit can be filed, specifies the relief that can be sought in such suits, sets ranges of monetary penalties that can be imposed for various violations, and authorizes imprisonment of violators under certain circumstances. *Id.* at 859-60. In comparable detail, section 505 of the act authorizes citizen suits. It identifies the substantive provisions of the act that can be enforced by citizen suits, requires that notice be given the administrative agency and the alleged violator before suit is filed, sets out the available remedies in such an action, makes special jurisdictional provisions for those suits, and even addresses the allocation of litigation costs. *Id.* at 888-89. Not surprisingly, the Court in *Milwaukee* construed the FWPCA as pre-empting the common law remedy that would have otherwise been available to the plaintiff.[22] The FWPCA has also been construed to pre-empt all remedies other than those expressly set out for the United States. *In the Matter of Oswego Barge Corp.*, 664 F.2d 327 (2nd Cir. 1981).

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[22]It is also significant that the subject matter of the FWPCA was a technical one ill-suited to development through federal common law. For that reason, Congress vested authority to administer the act in an agency possessing the required expertise. *Milwaukee*, 451 U.S. at 325. The particular common law remedy sought by the plaintiff in *Milwaukee* was directly contrary to regulations adopted by the agency under the act, *i.e.* plaintiff sought higher effluent limitations and overflow discharge controls of two waste treatment plants than those set by regulations. *Id.* at 319-20. Thus, the proposed common law remedy in *Milwaukee* was not interstitial, but would have completely supplanted the regulatory scheme. That fact made a pre-emption finding particularly appropriate. By contrast, the federal common law remedy sought by the Oneidas here is neither technical in nature nor inconsistent with the single express remedy found in the provision.

In contrast, the 1793 Act is plainly not so comprehensive as to pre-empt all remedies not addressed in the act. The 1793 Act covers three pages as printed in the *Statutes at Large* and contains one substantive provision regulating land transactions with Indian tribes.[23] Further, as noted above, the 1793 Act contains no provision dealing with tribal suits. In other words, the Act is not so sweeping or detailed to support a broad pre-emptive reading. It is well established in such cases that federal courts are free to fill in the statutory gaps with federal common law. *E.g., Mobil Oil Corp. v. Higginbothom*, 436 U.S. 618, 625 (1978).[24]

In a prior decision, this Court explicitly rejected a pre-emptive construction of another federal statutory restraint on alienation of Indian land. *Poafpybitty v. Skelly Oil Co., supra*. There an Indian allotee sought damages

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[23]The debate respecting the forfeiture clause does not show that Congress placed in the statute all remedies it intended to preserve. *See* County Petitioners Br. 19-20. That debate involved the repeal of an existing statutory remedy, not the availability of any federal common law remedy. Thus, the debate shows only that a particular statutory remedy was controversial, nothing more.

[24]The counties cite two other decisions on this point, neither of which advances their argument. Those cases, Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), and Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981), did not involve statutory displacement of pre-existing federal common law remedies. Rather, the plaintiffs there sought the creation of a federal common law right of contribution in a statutory proceeding. The Court was reluctant to create such a right for the first time when Congress had legislated on the subject in a comprehensive manner. *Texas Industries, Inc.* at 640-42; *Northwest Airlines, Inc.*, at 95-98. The 1793 Act must be construed with reference to independent, previously existing federal common law remedies.

for breach of lease of his restricted allotment.[25] The lease had been made under authority of a federal statute which contained two provisions relevant here. First, the statute subjected such leases to extensive secretarial supervision. Second, the statute expressly reserved all legal and equitable remedies for the Indian allottee after the expiration of the trust period. 390 U.S. at 372-75. Because of these provisions in the statute, the non-Indian lessee argued that all direct actions of the allottee, except those expresaly preserved at the expiration of the trust, were lost by negative inference. The Court rejected this claim. It found that the allottee had capacity to sue and "no warrant for implying by negative inference ". . . [that] all remedies otherwise available to the Indian allottee . . ." must be denied to him. *Id.* at 375. The message of *Poafpybitty* is clear: be it by negative inference or pre-emption, express remedies provided for violation of a restraint on alienation do not preclude an Indian owner from maintaining a federal common law action to protect his property. *See also Ewert v. Bluejacket*, 259 U.S. 129 (1922), where the Court allowed an Indian allottee to sue to set aside a void conveyance even though the applicable statute authorized only a $5,000 fine for the violation.

In summary, there is no basis in the statutory language or decisions of this Court for the proposed con-

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[25]Although the Court in *Poafpybitty* did not deal with the issue at length, it is clear from the opinion that the cause of action sued upon by the Indian allottee arose under federal common law. 390 U.S. at 367 n. 2, 376. Thus, the statutory construction sought by the non-Indian lessee there is the same as that sought by the counties and state here, although couched in different language.

struction of the 1793 Act as abolishing the Oneidas' federal common law remedies. The strained quality of the argument is particularly evident in light of the avowed protective purpose of the act (see discussion *infra*, p. 35) the substantial and varied nature of federal common law remedies as compared to the statute (see discussion *supra*, p. 12), and the strong evidence that Congress believed at the time that direct tribal actions could be maintained (see discussion *infra*, p. 30). For all these reasons, the proposed construction is without foundation.

II. The Oneidas Have A Current Right Of Action Under The 1793 Act

The district court below premised the liability of the counties to the Oneidas largely on the 1793 Act. 434 F. Supp. at 537-40. The court of appeals, observing that the counties had not denied that the Act was violated in 1795, concluded that the Act provided the Oneidas an implied action to set aside the violative transaction. 719 F.2d at 532. That statutory action, it further held, did not abate with the expiration of the 1793 Act. *Id.* at 537. Both holdings are well grounded in the language of the Act and its legislative history and are wholly consistent with decisions of this Court.

A. The declaratory language of the 1793 nonintercourse provision gives rise to tribal actions to enforce the Act.

In determining whether the Oneidas have a right of action for trespass damages under the 1793 Act, the intent of Congress governs. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 639. That intent may be ascertained from a number of factors, including

> legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed.

Daily Income Fund, Inc. v. Fox, — U.S. —, 78 L.Ed. 2d 645, 655 (1984).[25] Applying these factors here, it is plain that Congress intended to specially benefit Indian tribes and that tribal beneficiaries can enforce the statutory restraint on alienation through private actions.

It cannot be seriously doubted that the 1793 Act bestowed a special protection on tribal lands. This Court has so observed on a number of occasions. *See Wilson v. Omaha Tribe*, 442 U.S. at 664 ("... a major purpose of these acts as they developed was to protect the rights of Indians to their property"); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) ("The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties ..."); *United*

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[25] This standard is used to ascertain whether Congress intended to create a *private* right of action to enforce a statute. The Oneidas are not private parties in any sense. The Court has time and again acknowledged that, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory ... [they] are a good deal more than 'private, voluntary associations.'" United States v. Mazurie, 419 U.S. 544, 557 (1975); United States v. Wheeler, 435 U.S. 303, 323 (1978). Federal legislation dealing with Indian tribes, therefore, cannot be viewed as affecting individual conduct or property, but as "governance of once-sovereign communities." United States v. Antelope, 430 U.S. 641, 646 (1977). The following discussion assumes *arguendo* applicability of the general standard here.

States v. Candelaria, 271 U.S. 432, 441-42 (1926) (Congress intended "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges . . . .").[17]

But "the question is not simply who would benefit from the act, but whether Congress intended to confer federal rights on those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). The language of the nonintercourse provision speaks for itself here, too. By its terms, Indian tribes are entitled to oversight by the United States of tribal land transactions. Indeed, failure of the United States to perform its duty as overseer of such transactions is actionable breach of trust under the Act. *See United States v. Oneida Indian Nation of New York*, 477 F.2d 939, 942 (Ct. Cl. 1973). Thus, the focus on a specially protected class that received federal rights by virtue of the nonintercourse provision is unmistakeable.[18]

More importantly, there is ample evidence in the statutory language, legislative history and contemporary

[17]This view of the Act is taken as settled by the lower courts. *See, e.g.*, United States v. Southern Pacific Transportation Co., 543 F.2d at 697; Mohegan Tribe v. Connecticut, 638 F.2d 612, 622 (2nd Cir. 1981); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975); Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957); Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F. Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe v. Southern R.I. Land Devel. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976).

[18]There is no inconsistency in finding that a statute benefited a special class and also served a broader public purpose. For example, the Commodities Exchange Act, construed in Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), benefited the economy as a whole but was enacted for the special benefit of investors in futures contracts who could sue to enforce its provisions in private damages actions. *Id.* at 390.

legal context that Congress intended that tribes enforce the statutory prohibition in private actions. The nonintercourse provision states that "no purchase or grant of lands or of any title or claim thereto, from any Indians or nation or tribe of Indians . . . shall be of any validity in law or equity . . . " unless entered into in accordance with the section's provisions. 1 Stat. at 330. That language and similar language in other restraints on alienation of Indian lands have been consistently read as voiding illegal transactions. *See Busch v. Cole*, 263 U.S. at 254; *Ewert v. Bluejacket*, 259 U.S. at 138; *United States v. Noble*, 237 U.S. 74, 83 (1915); *United States v. Southern Pacific Transportation Co., supra*; *United States v. Boylan*, 265 Fed. 165 (2nd Cir. 1920). In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), section 215 of the Investment Advisors Act, which voided certain transactions was held to support an implied private right of action.[19] The Court reasoned that by "declaring certain contracts void, section 215 necessarily contemplates that the issue of voidness under its criteria may be litigated

[19]The voided transaction in *Transamerica* was a contract, not a land transfer. Thus, *Transamerica* gives little guidance as to the appropriate remedy for a void land transfer. But the existence of a right of action is a different question from the propriety of specific relief. As the Court stated in Bell v. Hood, 327 U.S. 678, 684 (1946),

> where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

See also Davis v. Passman, 442 U.S. 228, 239 (1979). The counties challenge only the existence of a cause of action in the Oneidas, not the propriety of relief awarded. *See* Petition for Certiorari, No. 1065. On that score, *Transamerica* supports the Oneidas' right of action.

somewhere." *Id.* at 19.[28] Similarly, Congress contemplated that voidness under the nonintercourse provision would be litigated by the tribes. *See also* discussion of 25 U.S.C. § 194, *infra* p. 30.

The legislative history of the 1793 Act likewise supports a private right of action. Although the legislative history of the act is "sparse and incomplete", 719 F.2d at 533, one important item of legislative history is revealing. Shortly after the passage of the 1790 nonintercourse provision, President Washington met with Cornplanter, Chief of the Seneca Tribe, to hear the tribe's complaint regarding certain land transactions. Referring to the 1790 act, President Washington assured the tribe that violations of the nonintercourse provision could be sued upon directly by it in federal court.

> Here, then is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under authority of the United States . . . if . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, *the federal courts will be open to you for redress, as to all other persons.*

I *American State Papers, Indian Affairs* 139 (1834) (emphasis added). This speech was printed and com-

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[28]The presence in the nonintercourse provision of a misdemeanor penalty does not distinguish it from section 215 of the Investment Advisors Act construed in *Transamerica*. Only where the statute in question did not benefit a special class or contained comprehensive remedies has the presence of a statutory remedy been sufficient to refute an implied right of action. *See* Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 13-14 (1981). That is not the case with either the nonintercourse provision or section 215 of the Investment Advisors Act.

municated to Congress on January 11, 1972. *Id.* at 142-43.[29] The following year Congress re-enacted substantially the same nonintercourse provision, the only significant change being the added reference to "law and equity". *See* discussion *supra*, p. 17. By doing so, Congress effectively adopted the President's construction. *See Johnson v. Southern P. Co.*, 196 U.S. 1, 19 (1904).

A final circumstance that may indicate Congress' intent respecting private rights of action is the legal context within which Congress enacted the statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 378. The concerns which prompted the current exacting standards for finding an implied action were entirely absent in 1793. *Id.* at 374-78; *California v. Sierra Club*, 451 U.S. at 298-301 (Stevens, J., concurring). Congress acted instead in 1793 under the common law rule explained in *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 36 (1916): where a statute is enacted for the benefit of a class of

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[29]Since President Washington was a major actor in the formulation of both the 1790 and 1793 acts, his view of the meaning of the nonintercourse provision cannot be taken lightly. *See* Prucha, 44, 46-49. That President Washington may have been proven wrong forty years later on the technical jurisdictional point does not undermine the reliability of his analysis as of 1790. *Cf.* Cherokee Nation v. Georgia, 30 U.S. at 18; County Petitioners' Br., n. 18. His speech is the best contemporaneous evidence on both the existence of a cause of action and the jurisdictional point.

Further, Congress would not have assumed even after the Court's decision in *Cherokee Nation* that tribes lacked capacity to sue and on that basis denied tribes an implied right of action. In *Cherokee Nation*, the Court held only that tribes were not foreign nations within the Court's original jurisdiction, not that tribes lacked the general capacity to sue. Lane v. Santa Rosa, *supra*. In fact, state courts entertained suits by tribal plaintiffs before the federal courts acquired federal question jurisdiction. Clinton & Hotopp, "Judicial Enforcement of the Federal Restraints on Alienation: The Origins of the Eastern Land Claims," 34 Me.L.Rev. 17, 46 n. 141 (1979).

which plaintiff is a member, the violation of the statutory right gives rise to a remedy, which the courts will provide unless the statute indicates to the contrary. *See also Ward v. Love County*, 253 U.S. 17, 24 (1920). Thus, the legal context of the 1793 statute corroborates the evidence of an intent to provide private rights of action found in the legislative history and statutory language.

Two other factors not directly related to Congress' intent are often looked to in determining implied statutory claims: whether it is consistent with the underlying purpose of the statute and whether the issue is one traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Texas Industries, Inc.*, 451 U.S. at 639. The answers to both inquiries are self-evident here. Because the statute provides no express remedies to set aside the land transactions declared of no effect by the nonintercourse provision, tribal suits are essential to effectuate the protective purpose of the Act. Otherwise, tribes have no sure means of recovering possession of lands lost in violation of the Act. And this Court held in *Oneida I* that protection of tribal property rights has traditionally been the exclusive province of federal law. 414 U.S. at 666. Thus, every relevant factor demonstrates the propriety of a private right of action in the Oneidas to vindicate their property rights. *See also, Wilson v. Omaha Tribe*, 442 U.S. at 670-71.

This Court need not be concerned that it would overstep proper judicial bounds by explicitly recognizing a statutory cause of action in the Oneidas. Since the enactment of the 1793 Indian Trade and Intercourse Act, Congress has repeatedly acted in recognition of or to preserve such tribal suits. In 1822, Congress enacted a statute allocating the burden of proof in such cases:

> That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Act of May 6, 1822, ch. 68, 3 Stat. 682, § 4; Act of June 30, 1834, ch. 161, 4 Stat. 733, § 22; Rev. Stat. 2126; now 25 U.S.C. § 194. Because very nearly all Indian lands were tribally owned in 1822, the reference to Indians as a party has been construed to include Indian tribes. *Wilson*, 442 U.S. at 665. And Indian tribes have historically been regarded as immune from suit as governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). In enacting the burden of proof statute, then, Congress directly acknowledged that tribes had both capacity and a cause of action to vindicate tribal property rights.

In 1966, Congress provided that federal district court jurisdiction shall extend to all such actions, regardless of the amount in controversy. *See* 28 U.S.C. § 1362. That act places tribal plaintiffs in substantially the same position as the United States with respect to those claims. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 472-73 (1976). In addition, Congress has on four occasions extended the statute of limitations that governs suits by tribes and the United States to recover trespass damages, specifically exempting title suits. *See* discussion *infra*, pp. 39-43.

Congress has also acted to preserve the claim that is the subject of this suit. In 1950, Congress extended New York state jurisdiction over Indian reservations, but explicitly provided that state law or jurisdiction would not

apply to tribal land claims. Act of July 2, 1948, ch. 809, 62 Stat. 1224, codified at 25 U.S.C. § 233. The legislative history of that act explains the purpose of the proviso as preserving Indian land rights as they existed before the passage of that act:

> [t]hey [Indian tribes] may go into the Federal courts and adjudicate any differences they may have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, . . .

96 Cong. Rec. 12460 (1950) (remarks of Congressman Morris). The right of action recognized and preserved by Congress in 1950 is the right of action sued upon by the Oneidas in 1970. Judicial cognizance of that right is, therefore, in the established tradition of statutory construction where the statute creates a right but does not specify a remedy. *Bell v. Hood, supra.*

B. The Oneidas' statutory right of action has not abated.

The counties maintain that, even if the Oneidas had a statutory action in 1795, the action abated when the statute expired in 1796. According to them, a cause of action cannot survive the repeal or expiration of the statute that gives rise to it unless the action has proceeded to final judgment. County Petitioners' Br. 35-38. The counties overlook the significant exception to that abatement rule for re-enacted statutes.[17]

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[17] In their abatement discussion, the counties distinguish between abatement of the Oneidas' federal common law and statutory rights of action. However, both their arguments rely in the end on the 1793 Act. For that reason, only the Act is addressed here.

The 1793 nonintercourse provision did not simply expire.[18] It was re-enacted in every subsequent revision of the Indian Trade and Intercourse Act with only minor word changes. *See* Act of May 19, 1796, ch. 30, 1 Stat. 469, § 12; Act of March 3, 1799, ch. 46, 1 Stat. 743, § 12; Act of March 30, 1802, ch. 13, 2 Stat. 139, § 12; Act of June 30, 1834, 4 Stat. at 730; Rev. Stat. § 2116; now 25 U.S.C. § 177. Thus, the nonintercourse provision has been continuous federal law since 1790. *Oneida I* at 667-68.

The abatement rule is inapplicable in such circumstances.[19] That is, where identical or substantially similar statutory provisions have been continually in force, the subsequent legislation is construed as a continuation of the earlier legislation despite formal repeal or expiration

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[18] Neither is the nonintercourse provision penal in nature and therefore subject to abatement as the counties suggest. *See* County Petitioners' Br. 36. As explained in Trop v. Dulles, 356 U.S. 86, 95-96 (1958):

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

The nonintercourse provision is manifestly intended to accomplish "some other legitimate governmental purpose" other than to punish and is not therefore, penal. In any event, only prosecutions under the misdemeanors could abate since those provisions did differ from one act to another. But the declaratory language of the provision, sued upon by the Oneidas, did not vary substantially.

[19] The counties argue that the rule relating to nonabatement of statutory policies continually in force is a modern rule not applicable to the 1793 statute. County Petitioners Br. n.29. True, Congress modified the common law of abatement in 1871. However, as the *Iolilie* case demonstrates, the abatement rule for re-enacted statutes was recognized in the pre-1871 common law.

of the earlier statute. Bear Lake Irrigation Co. v. Garland, 164 U.S. 1, 11-12 (1896); *Pacific Mail S.S. Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 456 (1865); *see also* C. Sands, 1 A *Statutes and Statutory Construction*, sec. 22.33 (4th ed. 1972). That doctrine governs here.

For this reason, the nonintercourse provision is distinguishable from the statutes construed in those cases relied on by the counties. *See Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (state criminal trespass act preempted by Civil Rights Act); *Gulf, Colorado & Santa Fe Railway Co. v. Dennis*, 224 U.S. 503 (1912) (statute declared unconstitutional and no similar statute enacted); *United States v. Tynen*, 78 U.S. 88 (1871) (criminal statute repealed by *direct* repugnancy with later statute); *Norris v. Crocker*, 54 U.S. 429 (1851) (provision repealed by enactment of inconsistent statute).[37] None of these cases suggests that a statutory action abates where, as here, the expired statute has been continuously re-enacted. Simply stated, the Oneidas' statutory cause of action was enforceable in 1795 and is enforceable now.

III. The United States Has Not Ratified The 1795 Transaction By Implication Or Otherwise

Although the counties and state acknowledge the absence of contemporaneous federal approval or explicit federal ratification of the 1795 transaction, they assert subsequent ratification by implication as a by-product of the federal approval of the 1798 and 1802 Oneida-New York State transactions.[38] County Petitioners' Br. 39-44; State Petitioner's Br. 32-36. The argument fails for two reasons. First, federal ratification of Indian land purchases must be plain and unambiguous, such as that were the 1798 and 1802 state treaties. Second, even were implicit federal approval sufficient, there is no evidence to support a finding of implicit ratification here.

[37] The *Norris* case is not an exception, as the counties suggest. Although Congress enacted a new fugitive slave act while an action under a former statute was pending, the later statute repealed the earlier statute by virtue of the inconsistency between the two. *Id.* at 472. Thus, the continuity in purpose and statutory language present in the nonintercourse provisions was missing in the statute construed in *Norris*.

A. Congress must express its intent plainly and unambiguously to extinguish Indian property rights.

It has long been a rule of this Court that ambiguities in Indian treaties, agreements, and statutes will be resolved in favor of the Indians' interests as between the tribe and the United States. *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982); *White Mountain Apache, supra* at 144. A corollary of that rule is that, although Congress may extinguish Indian property rights, it must express its intent plainly and unambiguously. As stated in *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 353-54 (1941):

> . . . an extinguishment [of Indian title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, . . . the rule of construction recognized without exception for over a century has been that 'doubtful expressions instead of being resolved in favor of the

[38] Inasmuch as the ratification argument assumes title in the Oneidas until the act of ratification, the counties must carry the burden of persuasion on this point. See 25 U.S.C. §194.

> United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'

The courts below correctly applied the *Santa Fe* rule here to judge the sufficiency of the claimed ratification of the 1795 transaction.

To avoid the plain and unambiguous standard, the counties and state cite cases where, it is suggested, an intent to alter tribal property rights was implied from less than plain congressional action.[37] The first, *Federal Power Commission v. Tuscarora Indian Nation*, *supra*, did not address the nature of congressional action required to extinguish Indian title. The second, *United States v. National Gypsum Co.*, 141 F.2d 859 (2nd Cir. 1944), involved an express delegation of trustee powers by the Congress to the state.[38]

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[37]The counties also rely on the proposition that the United States can subsequently ratify third party trespasses on Indian land by implication. See County Petitioners Br. 39. The two cases cited for that proposition are taken wholly out of context. Both cases refer to the familiar doctrine of principal-agency law that the principal can impliedly ratify a previously unauthorized act of his agent, thereby adopting the act as his own by relation back. See Shoshone Tribe v. United States, 299 U.S. 476, 496 (1937); United States v. Northern Paiute Nation, 490 F. 2d 954, 957-58 (Ct. Cl. 1974). Thus, the action being ratified in those cases was not the third parties' trespass, but the originally unauthorized acts of federal officers in approving or assisting in the trespass. Even so, where ratification of a federal agent's prior act extinguishes an Indian property right, the intent to ratify must be plain from the circumstances or congressional language. Coast Indian Community v. United States, 550 F.2d 639, 649 (Ct. Cl. 1977).

[38]The court examined the "understanding" of involved federal and state officials as evidence of the proper construction of the prior, express delegation of authority to the state. *National Gypsum* at 863. However, the court did not find approval of the state's authority to lease tribal lands from those official's past practices.

One lower court does indicate that a standard less rigorous than that applied in *Santa Fe* is applicable under certain circumstances. *Seneca Nation v. United States*, 173 Ct. Cl. 912 (1965). Without reference to this Court's decision in *Santa Fe*, the Court of Claims found extinguishment of the tribe's title from Congress' "explicit recognition and implicit ratification of New York's ownership of the tract . . ." *Id.* at 915. However, the court expressly conditioned applicability of that standard on the absence of any contention that the takings were inequitable in any respect. *Id.* at 915-16. Unlike the Seneca Nation, the Oneidas in their complaint alleged that the state had fraudulently induced them to enter into the 1795 transaction and had paid unconscionable consideration. J.A. 9a. Under the circumstances, there is no justification for applying any standard other than the rigorous plain and unambiguous test of *Santa Fe* to judge the counties' and state's evidence of implied ratification.

B. The acts of Congress approving the 1798 and 1802 state treaties did not validate the 1795 transaction.

Whether judged by the standard in *Santa Fe* or *Seneca Nation*, the acts of Congress which approved the 1798 and 1802 treaties are plainly insufficient to ratify the 1795 transaction. A brief review of Congress' actions with respect to the two later treaties shows the complete absence of intent to ratify the 1795 transaction.

The 1798 New York State treaty with the Oneidas recited the presence of a United States Commissioner. In the metes and bounds description of the land purchased, the State referred to a survey line run as part of the "last purchase" from the Oneidas. J.A. 36a. On February 13,

1799, the United States Senate ratified the 1798 state treaty. It did so in direct and sparse language:

> *Resolved* (two-thirds of the Senators present concurring therein), That the Senate do advise and consent to the ratification of the treaty made on behalf of the State of New York, with the Oneida Indians, on the first day of June 1798.

The Secretary was ordered to lay this resolution before the President of the United States. *See* 1 *Journal of the Executive Proceedings of the Senate* 312 (1828 ed.), excerpt of that date attached hereto as Appendix A.

Essentially the same events transpired in 1802. The treaty recited the presence of a United States Commissioner and the state employed survey lines drawn in previous transactions in the metes and bounds description. J.A. 38a. Again, no reference by name was made to the 1795 transaction and the Congress ratified the treaty in substantially the same language as that quoted above. *See* 1 *Journal of the Executive Proceedings of the Senate* at 428, excerpt of that date attached hereto as Appendix B.

Congress' language approving the 1798 and 1802 treaties makes no reference to the existence of the 1795 transaction, much less to its validity. The text of the later state treaties themselves makes no direct reference by date, name, or other recognizable expression, to the 1795 transaction. To be sure, it can be determined from extrinsic evidence that the "last purchase" referred to in 1798 and "lands heretofore ceded" mentioned in 1802 indeed meant the 1795 transaction. However, there is no indication that either the United States Commissioners attending those treaties or the Senate when ratifying them had that extrinsic evidence before them at the time. In short, Congress approved the two later state treaties in complete

ignorance that its acts might have referred to or implicated the 1795 transaction.

Even were the state's language imputed to Congress and Congress presumed to have constructive knowledge that that language referred to the 1795 transaction, ratification does not follow. The later state treaties referred only to survey lines drawn to mark off the land purportedly purchased in 1795. Adoption of survey lines evidences only the location of land, not title thereto. *Gibson v. Chouteau*, 39 Mo. 536 (1867), *appeal dismissed*, 78 U.S. (8 Wall.) 314. Congressional references to boundary locations, particularly such oblique references, do not constitute ratification of the state's claim of title to the property in question. *Seneca Nation*, *supra*.

The counties' and state's ratification argument is simply too manufactured to reflect Congress' actual intent. It depends on language imputed to Congress, constructive knowledge of the hidden meaning of that language, and implications from that hidden meaning. Had Congress actually intended to ratify the 1795 transaction, it would have done so by the same means it employed in 1799 and 1802, *i.e.* by a direct, simple statement. No intent to ratify the 1795 transaction can be found in the counties' construction.

IV. The Oneidas' Claim Is Not Barred By Any Statute Of Limitations

In 1982, the Congress for the first time explicitly provided that tribal actions founded in contract and tort are governed by the same federal statute of limitations that governs such claims filed by the United States on the

tribes' behalf. 28 U.S.C. §2415(a) and (b).[*] Section 2415 expressly does not "limit the time for bringing an action to establish the title to, or right to possession of, real or personal property." §2415(e). Congress could easily have limited title claims by tribes or by the United States on behalf of tribes. Nothing in §2415 or its legislative history indicates that Congress failed to do so in reliance on the applicability of state statutes of limitations to such claims. Rather, just as clearly as Congress intended to treat the United States and tribes identically with respect to contract and tort claims, Congress intended that title claims filed by tribes or the United States on their behalf would not be barred by any statute of limitations. 691 F.2d at 1084.

Section 1362 further indicates that tribal claims should be treated the same as suits filed by the United States with respect to the applicable statute of limitations. This statute granted tribes direct access to federal court specifically to litigate land claims that could have been brought by the United States on their behalf. H.Rep. 89-2040, 89th Cong. 2d Sess. 1-3 (1966). It also reflects Congress' intent that as to such claims, a tribe be placed in the same position as its trustee the United States at least in certain

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[*]Even before the 1982 amendment to section 2415 made its applicability to tribes indisputable, the statute had been construed as applying to tribes as well as the United States. *See Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465, 469-70 (9th Cir. 1975), construing section 2415 as originally enacted in 1966 (Act of July 18, 1966, Pub. L. 89-505, 80 Stat. 304) and as amended in 1972 (Act of July 18, 1972, Pub. L. 92-353, 86 Stat. 499). The same statute was extended in 1977 (Act of July 11, 1977, Pub. L. 95-64, 91 Stat. 268) and 1980 (Act of March 27, 1980, Pub. L. 97-365, 94 Stat. 126) before being made explicitly applicable to tribal claims in 1982.

respects. It is undisputed that a suit identical to this one by the United States on the Oneidas' behalf would not be barred by any statute of limitations. By virtue of §1362, neither should the Oneidas' suit be barred. *See Moe v. Salish and Kootenai Tribes*, *supra* at 472-74.

In addition, Congress has specially exempted New York tribes from application of any state statute of limitations. In 25 U.S.C. §233, the laws of New York were made inapplicable to "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." That statute shows a plain congressional intent that suits such as this be free of state law defenses. *See Oneida I* at 679-82.

Finally, examination of the legislative policy of the Trade and Intercourse Act—a policy cutting directly across state interests (*Oneida I* at 667-78; *Schaghticoke Tribe of Indians v. Kent School Corp.*, *supra*, 423 F. Supp. at 784), demonstrates the necessity for federal pre-emption of the state statute of limitations. *See White Mountain Apache Tribe v. Bracker*, *supra* at 133-34.

In 1795, the Oneidas could not independently sell tribal lands to the State of New York. The nonintercourse provision of the 1793 Act prohibited such transactions. In thus protecting Indian land, section 8 advanced the sovereign interest of the United States to maintain "peace and friendship" with the Indian tribes and, as trustee, to shield the tribes from improvident dispositions of their lands. *See* discussion infra, p. 25. With particular respect to the Oneidas, the United States also had a sovereign inter-

est to guarantee the Treaty of Canandaigua confirmation of Oneida title to the lands involved in the 1795 state purchase.

In seeking to establish title to the lands taken by the state in 1795, the Oneidas assert not only their own rights "but the sovereign claims of the United States as well." *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. at 784; *see also Heckman v. United States*, 224 U.S. at 437-38. Consequently, the passage of time should not bar the Oneidas from obtaining judicial remedy in circumstances where the United States, if it were to bring suit on behalf of the Oneidas, would not be subject to a statute of limitations defense. *Narragansett Tribe of Indians v. Southern R.I. Land Develop. Corp.*, *supra*, 418 F. Supp. at 805-06. A contrary conclusion would effectively enable the counties to claim title to Oneida lands without the requisite federal consent. *See Oneida I* at 667-68 (tribal possessory rights in land can be terminated only by sovereign act of the United States and, absent consent of the United States, state law cannot be invoked to limit such rights); *Wilson v. Omaha Indian Tribe*, 442 U.S. at 673, (state law should not be borrowed as the federal rule of decision if there is a "likelihood of injury to federal trust responsibilities or to tribal possessory interests" and where, as here, the tribes would only lose by the adoption of state law); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) ("State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute").

Every court that has examined the applicability of state statutes of limitation to tribal land claims has concluded that the claims are not barred by such statutes.[40] These precedents are soundly premised and should be followed.[41]

V. The Oneidas' Claim Does Not Present Non-Justiciable Political Questions

The political question doctrine has no bearing on this case.[42] "The nonjusticiability of a political question is

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[40]In addition to the courts below, 719 F.2d at 537-38 and 434 F. Supp. at 541-43, see, e.g., Catawba Indian Tribe of South Carolina v. South Carolina, 718 F.2d 1291, 1300 (4th Cir. 1983) *rehearing granted* Dec. 20, 1983); Cabazon Band of Mission Indians v. City of Indio, Calif., 694 F.2d 634, 638-39 (9th Cir. 1982); Oneida Indian Nation of New York v. State of New York, 691 F.2d at 1083-84; Mohegan Tribe v. Connecticut, 638 F.2d at 614-15 & n.3; United States v. Schwarz, 460 F.2d 1365, 1371-72 (7th Cir. 1972); United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (9th Cir. 1956); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422-23 (4th Cir. 1938); Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. at 1301-02; Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. at 783-85; Narragansett Tribe of Indians v. Southern Rhode Island Land Develop. Corp., 418 F. Supp. at 803-06. *And see* Ewert v. Bluejacket, supra, 259 U.S. at 138, and United States v. Forness, 125 F.2d 928, 932 (2nd Cir. 1942), cert. den. sub nom. City of Salamanca v. United States, 316 U.S. 694 (1942).

[41]Amici argue, referring to Felix v. Patrick, 145 U.S. 317 (1892), that laches also applies to bar this suit. Since the counties abandoned the laches defense on appeal, it is not before this Court. *See infra*, n. 2. In any event, the *Felix* case would not bar the Oneidas' claim. Given its broadest reading, *Felix* indicates only that laches may preclude certain remedies as against innocent third parties, but not bar the claim itself. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1333 (10th Cir. 1982). Even had the counties' good faith been established, the Oneidas would further be entitled to stand in the stead of the United States and avoid the limitation on remedies applied in *Felix*. *See* 28 U.S.C. § 1362.

[42]In *Oneida I* this Court implicitly concluded that the Oneidas' claim was justiciable. Justiciability is a jurisdictional issue that can be raised *sua sponte* by the Court. Poe v. Ullman, 367 U.S. 497, 508 (1961). In 1974, the issue of justiciability was not raised by the Court or the parties.

tected by the Act. The Indian Commerce Clause is the only textual commitment in the Constitution of authority over Indian affairs. U.S. Const., art. I, sec. 8, cl. 3. Its purpose is to benefit tribes by interposing the protective jurisdiction of the federal government "as a shield to protect Indian tribes from state and local interference." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982). Pursuant to that authority, Congress enacted the nonintercourse provision as part of the 1793 Act which bestowed certain federal rights on Indian tribes respecting tribal lands. *See* discussion *infra*, p. 25. Since the Oneidas seek only to vindicate a federally protected right, the action does not require that the Court intrude into a matter committed by the Constitution to a coordinate branch of government. *Baker v. Carr*, 369 U.S. at 231.

The counties' reliance on Article VII is similarly misplaced. By reciting that "peace and friendship" are the object of Article VII, and by its reference to "misconduct of individuals," and later to the "offender," Article VII clearly refers to criminal or quasi-criminal acts of individuals calculated to breach the peace and undertaken without claim of right or authority.

In contrast, the state purchase of Oneida land in 1795 was concluded by state officials acting under color of state law. The purchase did not constitute the "individual misconduct" contemplated by Article VII.[42]

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[42]Even if Article VII were construed to encompass misconduct of the State of New York and its political subdivisions, there is no indication that Article VII remedies were intended to be exclusive. Article VII does not authorize the President to settle land title disputes nor does it bar actions in federal court

(Continued on next page)

primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). It involves "the relationship between the judiciary and coordinate branches of the Federal Government." *Id.*

The Oneidas challenge, as a violation of federal law, the title to land of two political subdivisions of the State of New York. The purported title of these political subdivisions was acquired without the involvement of any branch of the Federal Government and the violation can be remedied without such involvement. In these circumstances, there is "no question decided, or to be decided, by a political branch of government coequal with this Court." *Id.* at 226. Therefore, federal judicial review and remedy of the challenged acts are permissible.

A. The Issues Raised by the Oneidas' Claim Have Not Been Constitutionally Committed to a Coordinate Political Branch.

The counties maintain that in section 5 of the 1793 Act and in Article VII of the 1794 Treaty of Canandaigua, the Congress delegated to the President exclusive discretionary authority to remedy the Oneidas' claim. County Petitioners' Br. 45-47. The argument is erroneous. Under the political question doctrine, only issues committed to a coordinated branch by the text of the Constitution are non-justiciable. *Baker v. Carr*, 369 U.S. at 211, 217; *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973).

Even accepting *arguendo* the counties' unprecedented expansion of the political question doctrine, neither section 5 of the 1793 Act or Article VII of the Treaty of Canandaigua preclude tribal action in federal court to enforce title rights guaranteed by the Treaty and pro-

B. The Oneidas' Claim is Not Barred by Any Decision or Policy Determination of the Political Branches.

In 1968, the Oneidas requested the Department of the Interior to bring suit against the State of New York to remedy the State's alleged unlawful taking of Oneida lands between 1788 and 1842. J.A. 42a-44a. The Commissioner of Indian Affairs, in declining the request, stated that litigation of the Oneidas' claims by the federal government "seems unnecessary" since the Oneidas could obtain compensation through the Indian Claims Commission. *Id.* The counties urge that the Commissioners' 1968 letter constitutes an executive decision or policy determination that forecloses judicial action by the Oneidas in the federal courts.

The counties fail to identify any required "adherence to a political decision already made" or an "initial policy determination of a kind clearly for nonjudicial discretion" that implicates separation of powers principles. Judicial resolution of the Oneidas' claim does not involve the federal courts in matters committed to the President or Congress. For this reason, judicial determination of title to property based upon construction of a statute or Indian treaty has always been treated as justiciable. *Washington v. Washington State Commercial Passenger Fishing*

(Continued from previous page)

to enforce property rights guaranteed by federal treaty. If Congress had intended to vest the Executive with exclusive authority over such matters, it would have done so explicitly. Heed & Co. v. Krewill Machinery Corp., 359 U.S. 297, 304 (1959); In the Matter of Kang-gi-Shin Co. (Crow Dog), 109 U.S. 556, 572 (1883).

Vessel Ass'n., 443 U.S. 658, 674-79 (1979); *United States v. Shoshone Tribe*, 304 U.S. at 116-17; *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 746-47 (1838); *Oneida Indian Nation of New York v. State of New York*, 691 F.2d at 1081-83; *Narragansett Tribe of Indians v. Southern R.I. Land Devel. Corp.*, 418 F. Supp. at 815. Such determinations do not usurp authority of the political branches. Rather, they assure that the intent of Congress, in providing statutory and treaty rights, will be respected. *Baker v. Carr*, 369 U.S. at 215 n.43.[40]

Finally, the justiciability of the Oneidas' claim is underscored by several acts of Congress that clearly contemplate federal court resolution of such claims. *See* 25 U.S.C. § 194; 25 U.S.C. § 233; 28 U.S.C. § 1362; and 28 U.S.C. § 2415(a).[41]

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[40]The counties also overlook the fact that the 1968 letter was not the executive branch's last word on the matter. In 1977, the Department of Interior asked the Department of Justice to litigate this claim on the Oneidas' behalf. *See* Appendix C attached hereto. The Department of Justice declined to do so expressing its preference for negotiated settlements in these cases. *See* Brief of Amici Curiae City of Escondido, etc., n.15. Thus, the executive branch has not finally determined that the Oneidas should be relegated to a monetary claim against the United States.

[41]The counties suggest that the Oneidas' claim is nonjusticiable because of internal disputes among and within the plaintiff tribes. Since the Oneida parties in this suit have always taken a consistent and mutually supportive position in this litigation, it is not at all clear to which disputes the counties refer. Just as non-Indian governments have internal political controversies, so do tribal governments. Any such internal differences do not affect the Oneida tribes' right to recover. 434 F. Supp. at 533.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

WEDNESDAY, FEBRUARY 13, 1799.

The Senate proceeded to consider the report of the Committee to whom was referred the treaty made with the Oneida Indians, on behalf of the State of New York;

And, on the question to advise and consent to the ratification of the said treaty, as reported by the Committee,

It passed unanimously in the affirmative, —Yeas, 25.

The yeas and nays being required by one-fifth of the Senators present.

Those who voted in the affirmative, are—Messrs. Anderson, Bingham, Bloodworth, Brown, Chipman, Davenport, Foster, Goodhue, Greene, Gold, Hillhouse, Howard, Langdon, Latimer, Livermore, Lloyd, Marshall, Martin, Paine, Ross, Sedgwick, Stockton, Tracy, Watson, and Wells.

Resolved, (two-thirds of the Senators present concurring therein,) That the Senate do advise and consent to the ratification of the treaty made on behalf of the State of New York, with the Oneida Indians, on the first day of June, 1798.

Ordered, That the Secretary lay this resolution before the President of the United States.

The Senate proceeded to consider the message of the President of the United States, of the 9th instant, and the nominations contained therein, and Timothy Taylor, and others, to office. Whereupon,

Resolved, That they do advise and consent to the appointments, agreeably to the nominations respectively.

Ordered, That the Secretary lay this resolution before the President of the United States.

APPENDIX B

FRIDAY, DECEMBER 31, 1802.

The treaty made under the authority of the United States between the State of New York and the Seneca nation of Indians, at Albany, thence day of August, 1802, was considered; and, on the question, Will the Senate advise and consent to the ratification thereof?

It was determined, unanimously, in the affirmative: Yeas 20.

Those who voted in the affirmative, are—Messrs. Baldwin, Bradley, Breckinridge, Clinton, Cocke, Dayton, Ellery, T. Foster, D. Foster, Franklin, Hillhouse, Jackson, J. Mason, Morris, Ogden, Olcott, Plumer, Sumpter, Tracy, and White.

So it was

"*Resolved*, (two-thirds of the Senators present concurring therein,) That the Senate do advise and consent to the ratification of the treaty, made under the authority of the United States, between the State of New York and the Seneca nation of Indians, the 30th day of August, 1802."

Ordered, That the Secretary lay this resolution before the President of the United States.

The treaty made under the authority of the United States between the State of New York and the Oneida nation of Indians, at their village, on the 4th day of June, 1802, was considered; and, on the question, Will the Senate advise and consent to the ratification thereof?

It was determined, unanimously, in the affirmative: Yeas 20.

Those who voted in the affirmative, are—Messrs. Baldwin, Bradley, Breckinridge, Clinton, Cocke, Dayton, Ellery, T. Foster, D. Foster, Franklin, Hillhouse, Jackson, J. Mason, Morris, Ogden, Olcott, Plumer, Sumpter, Tracy, and White.

So it was

"*Resolved*, (two-thirds of the Senators present concurring therein, That the Senate do advise and consent to the ratification of the treaty, made under the authority of the United States, between the State of New York and the Oneida nation of Indians, on the 4th day of June, 1802."

Ordered, That the Secretary lay this resolution before the President of the United States.

The treaty of limits, between the United States and the Creek nation of Indians, made near Fort Wilkinson, June 16th, 1802, was read the second time.

APPENDIX C

DEPARTMENT OF THE INTERIOR

news release

OFFICE OF THE SECRETARY

For Release July 1, 1977

INTERIOR ASKS DEPARTMENT OF JUSTICE TO BRING SUITS IN SUPPORT OF INDIAN CLAIMS IN NEW YORK STATE

Interior Department Solicitor Leo M. Krulitz announced today that on June 29 the Department made a final recommendation to the Justice Department to bring actions on behalf of three Indian tribes to recover lands in New York State. The Justice Department has agreed to bring the suits. Two claims were first referred to Justice in 1975 and the third was initially referred in 1976.

The proposed suits would be similar to actions now pending on behalf of the Passamaquoddy and Penobscot Indians with regard to land claims in the State of Maine. The New York suits would be based on the view that the lands involved were ceded to the State in treaties not authorized or formally participated in by the United States as required by the Indian Nonintercourse Act of 1790. The suits would seek ejectment and damages against those persons claiming an interest in the lands.

The three tribes involved are: the St. Regis Mohawk Tribe with a land claim of about 10,500 acres; the Cayuga Tribe with a land claim of about 62,000 acres; and the Oneida Nation with a claim of about 200,000 acres.

"The position which we are now taking on behalf of the tribes is that, as a matter of law, the United States should pursue their claims," Krulitz said. "However, we realize that the filing of a complaint may have an adverse

effect on land transactions in the claimed areas and meetings have been held with the tribes and representatives of New York State to discuss alternatives to litigation."

Krulitz said portions of the claims would be barred if suits aren't filed by Aug. 18. A bill is pending in Congress which would extend the deadline. "Extension of the deadline would provide time to see if some alternative other than litigation can be found to resolve these claims," Krulitz said.

The land claim areas are as follows:

Oneida:

The lands are generally located in Madison and Oneida Counties and border the southeast sector of Oneida Lake. Completely within the area are nine townships (Verona, Vernon and Augusta Townships in Oneida County; Stockbridge, Oneida, Lenox, Lincoln, Smithfield, and Fenner in Madison County) and seven villages (Oneida Castle, Sherill and Vernon in Vernon Township; Oneida in Oneida Township; Munnsville in Stockbridge Township; and Canastota and Wampsville in Lenox Township). Parts of two townships (Sullivan and Canaovia) and two villages (Chittenango and Canaovia) are also within the area.

Cayuga:

The lands are generally a three-mile wide strip surrounding the northern half of Cayuga Lake. The boundary between Cayuga and Seneca Counties dissects the lake so that about half the lands lie in each county. The southeasterly portion of the town of Seneca Falls is within the area.

St. Regis Mohawk:

The lands lie in both Franklin and St. Lawrence Counties. They include the lands immediately on the East of the present eastern boundary of the reservation to the town of Fort Covington. Two square miles are included in the towns of Fort Covington and Massena. The

triangular shaped area cutting the overall rectangular shape of the present reservation boundaries is involved, which includes the town of Hogansburg. Also included are the meadow lands along the Grass River and Barnhart and Baxter Islands in the St. Lawrence River.

• • •

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

June 30, 1977

IN REPLY REFER TO:

Mr. James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

This is in response to your letter dated February 25, 1977, requesting a clarification of our recommendation of litigation on behalf of the Oneida Nation of Indians to recover land disposed of in violation of the Indian Non-intercourse Act, 25 U.S.C. § 177.

We now request that the relief to be sought in the proposed litigation be 1) a declaratory judgment that the treaties which conveyed Oneida lands to New York State that were not ratified by the United States are void; 2) ejectment of all persons claiming a right to the present possession of the lands; and 3) money damages representing all rents, profits and issues accruing to the defendants during the time of their possession.

The involved lands were reserved to the Oneida Tribe of Indians in the Treaty of September 22, 1788, with New

York State. They consist of a contiguous tract of 231,-310.81 acres. In the Treaty with the Six Nations of November 11, 1794, 7 Stat. 44, the United States confirmed three of the tribes of the Iroquois confederacy, including the Oneida, in the lands that had been reserved to them in their treaties with the State. In 25 subsequent treaties all of the reserved lands, except for 737.42 acres, were ceded to the State. It is our position that the conveyances made in 23 of those treaties were in violation of the Indian Non-intercourse Act and Indian title today is paramount with respect to those lands.

As with our recommendation on behalf of the Cayuga tribe in connection with their treaty with the State of February 25, 1807,[1] we have reached no firm conclusion on the validity of two Oneida treaties in which a United States Commissioner was present, where the treaty was under the authority of the United States, it was executed with the Commissioner's approbation, and the Commissioner was appointed to hold the same. The two treaties are one of June 1, 1798, in which 36,650 acres were ceded and another of March 15, 1802 in which 11,634.50 acres were ceded. See Findings of Fact Nos. 7 and 8, 26 Ind. Cl. Comm. 151-152.

The Act of March 1, 1793, 1 Stat. 329, 330, includes a proviso which allows states to acquire lands but only through the means of a treaty. Since states cannot enter into treaties, U.S. Const., Art. 1, Sec. 10, Cl. 1, a treaty ratified by the Senate, as required by Art. 2, Sec. 2, Cl. 2, would seem to have been the only means of acquiring Indian lands until the year 1871 when treaty-making was ended by Congress, Act of March 3, 1871, 16 Stat. 566, 25 U.S.C.

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[1]Letter dated November 11, 1976 from Solicitor Austin to Assistant Attorney General Taft.

§ 71. Furthermore, the original Non-intercourse Act provision states that a cession must be " . . . by treaty or convention entered into pursuant to the Constitution." The 1793 amendment uses the term "treaty" twice. The connotation of the term in the amendment must be the same as in the original; thus, requiring Senate ratification, notwithstanding the fact that the treaty may in actuality be between the state and tribe. *See, e.g.*, Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55. While the State Court opinion in *Seneca Nation v. Christy*, 27 N.E. 275 (1891), asserts that a state may enter into a treaty with an Indian tribe and that congressional ratification of a state treaty is not a prerequisite to its validity, 27 N.E. at 277, 279-80, the Supreme Court expressly abstained from expressing its views on the issue, and dismissed the writ of error, 162 U.S. 283 (1896). Therefore, the question may be one of first impression. However, at this time we believe that more research is warranted. We will endeavor to promptly advise you of our final positions before litigation is commenced.

The lands are involved in the proceeding by the Oneida Nation before the Indian Claims Commission, Docket No. 201, Claims 3-6, in which Findings of Fact and Conclusions of Law were entered August 18, 1971, 26 Ind. Cl. Comm. 138. See Findings of Fact Nos. 6-28, 26 Ind. Cl. Comm. 150-162. There is presently pending a settlement which is to result in the payment of $3.3 million for claims 1 and 2 involving lands affected under pre-1970 dispositions and dismissal with prejudice of claims 3-7. (Claim 8 was voluntarily dismissed by the plaintiff several years ago.)

We recommend that litigation be initiated on behalf of the Oneida Nation of Indians. There are three constituent

groups of Oneidas located in New York, Wisconsin and Ontario, Canada. We are unsure whether the Oneida of the Thames at Southwold, Ontario have a legal claim to the New York lands as do the other groups. However, we think it is adequate for present purposes to identify the beneficiary of our trust responsibilities as the "Oneida Nation of Indians."

The lands, as mentioned above, form a contiguous tract as depicted on the map prepared by Cadastral Survey of the Bureau of Land Management for the Indian Claims Commission Docket No. 301 proceeding. Enclosed is a copy of the map prepared in March 1967 and revised in August 1973. In the Treaty of September 22, 1788 with the State, New York reserved an area of 231,310.18 acres for the exclusive use of the Oneidas. In addition, New York agreed "... there shall forever remain ungranted [within the area ceded] ... one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida lake, one half mile of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of said State to land and encamp on." In the treaty, the Oneidas also ceded land to the New England Indians settled at Brotherton to the East of the area, and the Stockbridge Indians. The tract ceded to the Stockbridge is six miles square and is located within the reserved lands.

It appears from the language of the 1788 treaty that the Oneidas were not reserved a present exclusive right of occupation to the one-half mile at every six miles along the

northern lake bank, along Fish Creek and at a place on the Onondaga River. The 1794 Treaty with the Six Nations merely acknowledged the "lands reserved to the [three Indian] Nations, ... and called their reservations. ..." and, possibly, had no effect on the lands New York agreed would remain ungranted. A party seeking ejectment must have a present right to possession paramount to the person against whom it is sought. Since it is unclear that the Indians do have such a paramount right, we recommend at this time that such lands not be included in those from which ejectment is sought. Nevertheless, we are of the view that any grant of those lands by the State after the year 1790 would have required the approval of the United States because of the reservation of the lands in the Oneidas. It appears that all but the place on the Onondaga River were later granted. Since to our knowledge no such approval was obtained, the dispositions would similarly be void. We believe that the question of the Indians' interest and the effect of a subsequent grant of the lands by the State are appropriate for declaratory judgment relief. Because surveys and title searches would be required to describe the lands and to identify each potential defendant claiming an interest in them, unlike the simplified method we propose below for identifying the defendants within the reserved area, we will defer recommending litigation on this matter until such person claiming an interest in the lands is identified.

There are eleven townships and nine villages within the 1788 treaty area. Of these, nine townships and seven villages are completely within the reserved area and two townships (Sullivan and Cazenovia) and two villages (Chittenango and Cazenovia) are partly within and partly outside

the area. Excluding the Stockbridge reservation, seven townships and six villages are completely within the reservation area. If the Stockbridge reservation lands and those affected by the 1788 and 1802 treaties are excluded, there are four complete townships and four villages within the area. Lists are available at nominal costs of all persons within the townships and villages assessed property taxes. We will obtain those lists and propose using these as the basis for naming the defendants.

We recognize that by not naming each party defendant by July 17, 1977—the date the statute of limitations for money damages, 28 U.S.C. §2415, runs—that we are foreclosing obtaining pre-1966 money damages against them. However, the statute of limitations may be extended so as to allow time for the naming of each defendant. But under the circumstances, using the lists of those assessed property taxes is the only feasible way of identifying defendants.

We have met with officials of the Oneida Nation to explore with them the possibility of a resolution of their claims apart from litigation. While we expect to hold further meetings with them, we cannot at this time predict whether such discussions will be fruitful. We are, however, committed to pursuing their claims through litigation.

We urge that you act with all speed in readying a complaint for filing before July 18. We stand ready to assist you and to furnish you any additional information you deem necessary. We believe that the lists we will furnish you with can be used as the basis for filing the complaint so as to toll the running of the statute of limitations. There

is no requirement by way of statute, Federal Rules of Civil Procedure or local rules of the District Court for the Northern District of New York that the complaint name each defendant. Thus, the complaint may be filed attaching the list of persons and the action will have been commenced. Rule 3, Fed. R. Civ. P. Service of the summons and complaint can then follow.

Sincerely,

LEO M. KRULITZ
Solicitor

bcc: Solicitor Docket File
Secretary reading file (2)
DJones file (2)
RBuckner file
DIA reading file
Hold copy

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RESPONDENT'S

BRIEF

Nos. 83-1065, 83-1240.

FILED

JUL 16 1984

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of the County of Oneida, New York, and the County of Madison, New York, as Respondents in No. 83-1240.

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BEST AVAILABLE COPY

Questions Presented for Review.

1. Whether, assuming that an Indian tribe and the State of New York failed to comply with the Trade and Intercourse Act of 1793 in making a conveyance of land in 1795, and assuming that as a result the present occupiers of that land have been adjudged liable in trespass to the descendants of that tribe, the present occupiers have a cause of action in indemnity against the State under New York or federal law;

2. Whether ancillary subject matter jurisdiction exists for the state law claim;

3. Whether the State waived its immunity to suit by participating in the 1795 conveyance.

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Nos. 83-1065, 83-1240.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK, THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of the County of Oneida, New York, and the County of Madison, New York, as Respondents in No. 83-1240.

Statement of the Case.

Most of the facts pertinent to the issues raised in this brief are set forth in the Counties' brief as petitioners in No. 83-1065, and need not be repeated here. It is sufficient to note that the liability of the Counties to the Oneidas is premised upon a finding that the State purchased certain land from the original Oneida Nation on September 15, 1795, in violation of the Trade and Intercourse Act of 1793. The Counties had nothing whatsoever to do with that transaction; they did not even exist in 1795. The County of Oneida was not created until 1798, and the County of Madison was not until 1806. 1798 N.Y. Laws c. 31; 1806 N.Y. Laws c. 70. The Counties came into possession of the land well after the 1795 transaction. No one has ever questioned that they acquired, improved, and have held the land in good faith.

Summary of Argument.

1. The Counties' third-party claim for indemnity is based upon both New York and federal law. Indemnity is available under the law of New York whenever a party has discharged an obligation properly owed by another, and "simple fairness" requires indemnification. Simple fairness mandates that the Counties be indemnified by the State. They are absolutely innocent of any wrongdoing, and in fact did not even exist at the time of the 1795 transaction.

The Counties' federal claim against the State is derived from precisely the same sources as the Oneidas' claim against the Counties. The Counties do not concede that the Oneidas have such a claim, but contend that if such a right is created for the Oneidas, this Court should be no less flexible in creating a right for the Counties (pp. 3-8).

2. The jurisdictional basis of the Counties' federal law claim is 28 U.S.C. § 1331. Jurisdiction for the Counties' state law claim is based upon well-settled principles of ancillary jurisdiction. The State's argument confuses subject matter jurisdiction and Eleventh Amendment immunity, which are analytically distinct and must be addressed separately (pp. 8-12).

3. The State constructively waived its immunity, under the rule of *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964), by transacting with the original Oneida Nation in 1795. The State's purchase was a proprietary act, made for profit, and did not involve traditional or core state governmental activity. Furthermore, the State purchased the land with actual knowledge of a federal statute expressly prohibiting such purchases; indeed, the State's conduct constituted a federal crime. The State accordingly waived whatever immunity it may otherwise have enjoyed. The fact that the Counties are not Indians, and that they are asserting a claim in a third-party context, rather than directly, has no effect on whether the State is immune (pp. 12-24).

Argument.

I. The State of New York Should Indemnify the Counties for Any Liability Imposed Against Them in this Action.

The argument of the Counties is simple. The Counties were not parties to the 1795 transaction between the State and the original Oneida Nation, by which the State is alleged to have wrongfully dispossessed the Oneidas of their land. Because the Counties are in possession of the land, however, they have been found liable to the Oneidas. The State was the entity which committed the wrong; the Counties, as the District Court found, are good faith occupiers who had no connection with that wrong. It would be unfair to force the Counties to pay the judgment, and to allow the State to escape liability would unjustly enrich it. Accordingly, the State should fully indemnify the Counties for any liability charged against them.

The Counties' claim is grounded in both state and federal law.

A. *The Counties Are Entitled to Indemnity under New York Law.*

The principles underlying the right of indemnification under New York law were well-expressed in a recent opinion of the New York Court of Appeals. In *McDermott* v. *City of New York*, 50 N.Y.2d 211, 428 N.Y.S.2d 643, 406 N.E.2d 460 (1980), Chief Judge Cooke noted:

> Conceptually, implied indemnification finds its roots in the principles of equity. It is nothing short of *simple fairness* to recognize that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" (Restatement, Restitution, § 76). *To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs.*
>
> . . . . . .
>
> As was true with many unjust enrichment cases, the vehicle through which the law operated was the quasi contract . . . . Thus, the rule developed that "[w]here payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law."

Id., 50 N.Y.2d at 216-17, 428 N.Y.S.2d at 646, 406 N.E.2d at 462 (citations and footnote omitted; emphasis added). *Accord, Brown* v. *Rosenbaum*, 287 N.Y. 510, 518-19, 41 N.E.2d 77, 80-81 (1942); *Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 217-18, 67 N.E. 439, 439-40 (1903); *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola*, 134 N.Y. 461, 467-68, 31 N.E. 987, 989 (1892); *City of Brooklyn* v. *Brooklyn City R.R.*, 47 N.Y. 475, 486-87 (1872); 23 N.Y.Jur.2d *Contribution, Indemnity, and Subrogation*, §§ 62-64.

Indemnity is allowed in scores of situations where an innocent party has been found technically liable, and seeks to pass that liability on to the party who actually committed the wrongful act. Thus, for example, retailers and distributors selling defective products are entitled to indemnity from the party who manufactured the product, *Spector* v. *K-Mart Corp.*, 99 A.D.2d 605, 471 N.Y.S.2d 711 (1984); *All-Tronics, Inc.* v. *Ampelectric Co.*, 44 A.D.2d 693, 354 N.Y.S.2d 154 (1974); *Catanello* v. *Cudahy Packing Co.*, 264 A.D. 723, 34 N.Y.S.2d 37 (1942); property owners are entitled to indemnity from employees and contractors working on the property who negligently cause injury to another, *Mauro* v. *McCrindle*, 70 A.D.2d 77, 419 N.Y.S.2d 710 (1979) *aff'd*, 52 N.Y.2d 719, 436 N.Y.S.2d 273, 417 N.E.2d 567 (1980); *Tipaldi* v. *Riverside Memorial Chapel*, 273 A.D. 414, 78 N.Y.S.2d 12, *aff'd*, 298 N.Y. 686, 82 N.E.2d 585 (1948); hospitals are entitled to indemnity from negligent physicians, *Cox* v. *Cordice*, 90 A.D.2d 297, 457 N.Y.S.2d 2 (1982), *aff'd*, 60 N.Y.2d 723, 469 N.Y.S.2d 80, 456 N.E.2d 1203 (1983); *Macari* v. *Parsons Hospital*, 26 A.D.2d 584, 271 N.Y.S.2d 1009 (1966); motor vehicle owners are entitled to indemnity from negligent operators, *Dittman* v. *Davis*, 274 A.D. 836, 80 N.Y.S.2d 737 (1948) *aff'd*, 299 N.Y. 601, 86 N.E.2d 175 (1949); and lessors are entitled to indemnity from lessees who negligently breach their duty to exercise due care while in occupation of premises, *Richardson* v. *Cannold Holding Corp.*, 283 A.D. 789, 128 N.Y.S.2d 814 (1954), *aff'd*, 308 N.Y. 932, 127 N.E.2d 85 (1955); *Merkle* v. *110 Glen Street Realty Corp.*, 282 A.D. 617,

125 N.Y.S.2d 881 (1953). The right to indemnity is not premised upon any particular relationship or duty between the parties, but "rests instead on the parties' relative responsibility as determined on the facts as a whole." *Mauro* v. *McCrindle*, *supra*, 710 A.D.2d at 83, 419 N.Y.S.2d at 714-15. In short, the concept is employed whenever "simple fairness" compels it, and no reason exists to bar it.

Simple fairness requires that the State assumes the liability which it wholly created. The Counties did not exist in 1795, did not participate in the conveyance, and should not now be forced to pay.[1]

The State argues at great length that the District Court and Court of Appeals erroneously applied New York law, chiefly because those courts refused to treat the indemnity claim as one for an implied covenant of quiet enjoyment. The State's view of the law is clearly incorrect.[2] In any event, the State's

[1] Furthermore, the Counties justifiably relied on the actions of the State and the United States in believing they held clear title to the land. The State Surveyor General laid out the land in question in lots, and the State repeatedly treated the 1795 transaction as valid in later treaties with the Oneidas. (Jt. App. at 137a-141a, 142a, 143a.) The United States not only approved those later treaties, 434 F.Supp. at 535 (Jt. App. at 58a), but also repeatedly disclaimed responsibility for Eastern Indian affairs. *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981). *See* the Counties' brief as petitioners in No. 83-1065, at 41-44.

[2] The Counties do not claim in contract against the State, based upon an implied warranty of title; they claim in tort on principles of indemnity. N.Y. Real Prop. Law § 251, which precludes the implication of covenants in transfers of real estate, is designed to promote stability in real estate titles by requiring that covenants be expressly set out in deeds. *See Burwell* v. *Jackson*, 9 N.Y. 535, 541 (1854). That statute was *not* intended to bar all tort claims in which a transfer of real estate happened to be involved. Indeed, even the authority cited by the State states that § 251 applies only in contractual contexts "[w]here both parties are innocent of fraud," *Whittemore* v. *Farrington*, 76 N.Y. 452 (1879) or where no "fraud or mutual mistake" is involved, *Coffin* v. *City of Brooklyn*, 116 N.Y. 159 (1889), making it clear that tort law was not intended to be entirely supplanted. The circumstances of this action are *sui generis* and cannot be controlled by a statute having a vastly different purpose.

argument is based on issues of state law which have been passed upon by two local federal courts, which do not implicate constitutional principles, and which accordingly do not warrant further attention from this Court. The argument that the law of real property would be "completely upset" is wholly without merit; an affirmance of the ruling below would not allow a "garden-variety" grantee to sue his grantor for implied indemnity where title has failed, any more than this Court's holding in this action in 1974 permits non-Indian grantees to bring suit in federal court. *See* 414 U.S. at 684 (Rehnquist, J., concurring).

In short, if any wrong has been committed in this case, it has been committed by the State of New York. It would be grossly unfair to force the taxpayers of the Counties to shoulder the burden of rectifying the wrongful conduct of the State.

B. *The Counties Are Entitled to Indemnity under Federal Law.*

The Counties also seek indemnity based upon federal common law and the Trade and Intercourse Act of 1793. As set forth in their brief as petitioners in No. 83-1065, the Counties contend that the Oneidas have no right to relief under federal law. The Counties further contend, however, that it would be manifestly unjust to hold that the Oneidas have a claim against the Counties under federal law, but to leave the Counties to fend for themselves under state law when they seek to pass that liability onto the wrongdoing party. If it is proper to fashion a right for the Oneidas under the peculiar circumstances of this action, the Court ought to be no less flexible in fashioning a right on behalf of innocent landowning defendants.

It is worth remarking that the ostensible purpose behind this lengthy and elaborate lawsuit is the vindication of the principles

set forth in the Trade and Intercourse Act. Whether those principles are worthy of vindication at this late date, and against these innocent parties, is the subject of another brief in this litigation; but if any sense is to be made of their vindication, the wrongdoer must be charged with the liability. Anything short of that results in the unjust enrichment of the wrongdoer, and a clear injustice to the party forced to pay. *See Gordon v. Burr*, 506 F.2d 1080, 1084-85 (2d Cir. 1974).

It is also important to focus again on the strange context in which this action arises. The events on which the rights of the parties turn occurred almost two centuries ago, yet the courts below declined to apply the usual time-barring doctrines — such as the statute of limitations and laches — to the Oneidas. The suit presages the forced transfer of sovereignty over an enormous tract of land after nearly two hundred years of knowing acquiescence by Congress, yet the courts have held that Congress never intended to treat the 1795 transaction as valid. The fiction that the present Oneidas are the same entity as the Oneida Nation of 1795 has been accepted without hesitation. In short, the federal courts, acting sometimes with remarkable dexterity, have removed every ordinary legal barrier to the prosecution of this action. The great solicitude which the courts have demonstrated toward the Oneidas in prosecuting this claim ought to be paralleled, at least in part, by establishing a federal right on behalf of the Counties, who are absolutely innocent of any wrongdoing. Anything less works an injustice in the extreme.

II. The Counties' Claim for Indemnity Falls Within the Ancillary Subject Matter Jurisdiction of the District Court.

The Counties' third-party claim against the state is based upon two sources: New York law of indemnity and federal law.

The Counties maintain that subject matter jurisdiction for the former exists under principles of ancillary jurisdiction, and that the latter presents a federal question within the meaning of 28 U.S.C. § 1331.[3]

The State argues that no ancillary jurisdiction exists over the Counties' state law claim, principally on the grounds that the Eleventh Amendment stands as a bar.[4] That argument, however, confuses the issues of subject matter jurisdiction and sovereign immunity. While both are limits on the judicial power of federal courts, the two concepts are analytically distinct and must be addressed separately.[5]

Ancillary jurisdiction is

> an ill-defined, judicially developed concept based on the premise that a district court acquires jurisdiction over a case or controversy in its entirety and, as an incident to the disposition of a dispute that is properly before it, may exercise jurisdiction to decide other matters raised by the case over which it would not have jurisdiction were they independently presented.

6 C. Wright & Miller, Federal Practice & Procedure: Civil § 1444. Since *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926), its chief use has been in the context of multiparty practice, such as third-party claims, compulsory counterclaims, cross-claims, and intervention as of right. *See Owen*

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[3]Of course, the Counties' state law claim for indemnity is also pendent to their federal law claim for indemnity, further supporting the exercise of federal jurisdiction over the state law claim.

[4]The State does not apparently dispute the federal question jurisdiction asserted by the Counties.

[5]One critical distinction is that sovereign immunity may be waived, whereas a lack of subject matter jurisdiction cannot be consented to or cured. *Cf., e.g., Clark* v *Barnard*, 108 U.S. 436, 447 (1883) ("immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure") *with Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908) (parties cannot consent to federal subject matter jurisdiction).

Equipment & Erection Co. v. *Kroger*, 437 U.S. 365, 375 n.18 (1978).

In third-party practice, ancillary jurisdiction has been employed principally in order to entertain claims for contribution or indemnity. Thus, cases in which state law indemnity claims have been found to be within the ancillary jurisdiction of the federal courts are legion. *See, e.g., Pennsylvania R. R.* v. *Erie Ave. Warehouse Co.*, 302 F.2d 843, 845 (3d Cir. 1962); *Southern Milling Co.* v. *United States*, 270 F.2d 80, 84 (5th Cir. 1959); *Dery* v. *Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); *Waylander-Peterson Co.* v. *Great Northern Ry.*, 201 F.2d 408, 415 (8th Cir. 1953); *Gunnell* v. *Amoco Oil Co.*, 490 F. Supp. 67, 68 n.1 (W.D. Mich. 1980); *Testa* v. *Winquist*, 451 F.Supp. 388, 396 (D.R.I. 1978); *Ross* v. *Penn Central Transportation Co.*, 433 F.Supp. 306, 308 (W.D. N.Y. 1977); *Lyons* v. *Marrud, Inc.*, 46 F.R.D. 451, 454 (S.D.N.Y. 1968); *Fong* v. *United States*, 21 F.R.D. 385, 387 (N.D. Cal. 1957). The holding below that ancillary jurisdiction exists for the Counties' claim was therefore simply a straightforward application of a basic, and long-established, doctrine.

Not surprisingly, the Counties' claim falls squarely within the analytic framework set forth in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 (1978), for determining when federal courts can exercise jurisdiction over nonfederal claims. First, both the Counties' claim for indemnity and the Oneidas' primary claim obviously arise from a "common nucleus of operative fact," the 1795 transaction. Second, the jurisdictional statutes upon which the Oneidas' claim is based, 28 U.S.C. §§ 1331, 1362, contain no limitations, express or implied, upon the exercise of ancillary jurisdiction. Finally, and most importantly, the context in which the Counties' nonfederal claim is asserted is *precisely* the context outlined in *Owen* as historically supporting the exercise of ancillary jurisdiction. The *Owen* Court expressly stated that where a defendant impleads a third-party defendant for purposes of asserting a nonfederal claim, such a claim is "*always*" ancillary to the federal claim. 437 U.S. at 376 (emphasis added).

The State's argument rests chiefly on two decisions of this Court: *Pennhurst State School & Hospital* v. *Halderman*, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), and *Aldinger* v. *Howard*, 427 U.S. 1 (1976).[6] *Pennhurst* holds that the mere *existence* of a pendent state law claim — standing by itself — cannot override the Eleventh Amendment immunity of a state. The issue of whether that immunity had been waived was neither raised by the parties nor considered by the Court. The Counties do *not* maintain that the mere *existence* of an ancillary state law claim — standing by itself — can override the State's immunity; rather, they maintain that the State has waived its immunity to suit through an independent act, its transaction with the Oneidas. *See* text, *infra*, at 12-24. *Aldinger* is even less on point; there, the Court held that the exercise of pendent jurisdiction was precluded by the particular jurisdictional statute at issue, 28 U.S.C. § 1343(3). As noted, there is nothing whatsoever in 28 U.S.C. §§ 1331 and 1362 which expressly or implicitly suggests a limitation on the exercise of ancillary jurisdiction.[7]

[6] Both *Pennhurst* and *Aldinger* involved assertions of *pendent*, rather than ancillary, jurisdiction. While the State suggests that the two doctrines are interchangeable, State's Brief at 37 (note), in truth the equitable considerations behind ancillary jurisdiction are far more compelling. Pendent jurisdiction is typically asserted by plaintiffs; "[b]y contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will. . . ." *Owen Equipment & Erection Co.* v. *Kroger*, *supra*, 437 U.S. at 376 (1978). The denial of ancillary jurisdiction therefore forces a defendant into the difficulty and expense of maintaining a separate lawsuit in a separate court, before different judges and juries. *See Testa* v. *Winquist*, *supra*, 451 F.Supp. at 396; *Revere Copper & Brass, Inc.* v. *Aetna Casualty & Surety Co.*, 426 F.2d 709, 716 (5th Cir. 1970).

[7] While the Court in *Aldinger* did observe that "[i]f the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim," 427 U.S. at 18, that is a long step from asserting that such a party may never be joined. Indeed, the

The additional cases cited by the State, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), and *Jones* v. *Scofield Bros., Inc.*, 73 F.Supp. 395 (D.Md. 1947), simply hold that sovereign immunity may bar an otherwise valid cross-claim or third-party claim. It is well-established, however, that where a state has waived its immunity, it is fully subject to an ancillary state law claim. *See, e.g., Laird* v. *Chrysler Corp.*, 92 F.R.D. 473, 474 (D. Mass. 1981); *Chicago & North Western Transportation Co.* v. *Hurst Excavating, Inc.*, 498 F.Supp. 1, 3 (N.D. Iowa 1978); *Flores* v. *Norton & Ramsey Lines, Inc.*, 352 F.Supp. 150 (W.D. Tex. 1972).[9]

In summary, ancillary jurisdiction plainly exists over third-party claims for indemnity such as that asserted by the Counties. The sole remaining question is whether the Counties' claim is barred by the Eleventh Amendment.

III. The Counties' Claim for Indemnity is Not Barred by the Eleventh Amendment.

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. Despite its limited literal language, the amendment has long been held to bar suits against an unconsenting state by its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1 (1890).[9]

Although the Eleventh Amendment is a limit on the judicial power of the federal courts, and "partakes of the nature of a jurisdictional bar," *Edelman* v. *Jordan*, 415 U.S. 651, 677-78 (1973), it may be waived by Congress acting pursuant to the authority delegated to it by the states under the federal Constitution. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). A state may also waive its immunity from suit, whether by statute, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 392 (1894), or by engaging in a particular course of conduct, *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964).

The question before the Court is whether the State constructively waived its immunity by transacting with the original Oneida Nation in 1795.[10] That question is controlled by a trilogy

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adoption of such a principle would wholly erase ancillary jurisdiction over third-party claims. As one court has noted:

> It is literally hornbook law that the court's ancillary jurisdiction over a third-party claim requires no independent basis of jurisdiction provided that the federal court has . . . jurisdiction over the main claim. . . . *By definition*, ancillary jurisdiction in this context contemplates impleading a party over whom the federal court would otherwise have no jurisdiction.

Testa v. *Winquist*, *supra*, 451 F. Supp. at 396 (emphasis added).

[9] Similarly, a state is subject to third-party claims for indemnity brought by the United States, as the Eleventh Amendment does not apply to such suits. *See, e.g., United States* v. *Illinois*, 454 F.2d 297 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); *Lee* v. *Brooks*, 315 F.Supp. 729 (D. Hawaii 1970); *Williams* v. *United States*, 42 F.R.D. 609 (S.D. N.Y. 1967).

[9] Jurisprudence under the Eleventh Amendment typically "has focused not on the language of the Eleventh Amendment, but on the concept of sovereign immunity of which it is a reminder and 'exemplification'." L. Tribe, American Constitutional Law 131, citing *Ex Parte New York*, 256 U.S. 490, 497 (1921). The relationship between the Eleventh Amendment and sovereign immunity has been a source of controversy, both among members of this Court and among commentators. *Cf., e.g., Employees* v. *Dept. of Public Health & Welfare of Missouri*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring), *with id.*, 411 U.S. at 309-324 (Brennan, J., dissenting). *See generally* Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U.Pa.L.Rev. 515 (1978) and Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits upon the States, 126 U.Pa.L.Rev. 1203 (1978).

[10] The State's transaction with the original Oneida Nation occurred after the ratification of the Eleventh Amendment, although both occurred in 1795. The

of cases decided by this Court: *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964); *Employees* v. *Dept. of Public Health & Welfare of Missouri*, 411 U.S. 279 (1973); and *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

In *Parden*, the State of Alabama owned and operated a railroad in interstate commerce. Congress, acting pursuant to the powers delegated to it under the Commerce Clause, had previously enacted the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which provides *inter alia* that a railroad employee may sue his employer for personal injuries sustained in the course of his employment. An injured employee sued Alabama under the FELA, and Alabama raised the defense of sovereign immunity. The Court, however, found that Alabama

amendment was ratified on February 7, 1795, and the transaction occurred on September 15, 1795.

The ratification of the Eleventh Amendment has been a subject of some confusion. When the proposed amendment was placed before the states, on March 4, 1794, there were then 15 states: the original 13 plus Vermont and Kentucky. C. Jacobs, The Eleventh Amendment and Sovereign Immunity 67 (1972) (hereinafter "Jacobs"). The requisite three-fourths majority needed to adopt the amendment was thus 12 states. U.S. Const., Art. V. The twelfth state to ratify the amendment was North Carolina, which did so on February 7, 1795. Documents Relating to the Proposal and Ratification of the Eleventh Amendment, Ratified Amendments, National Archives, Record Group 11, *cited in* D. Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga.L.Rev. 207, 227-28 n.77 (1968) (hereinafter "Mathis"); Jacobs, at 67 & n.96. The amendment automatically took effect upon North Carolina's ratification. *Dillon* v. *Gloss*, 256 U.S. 368, 376 (1921).

The Eleventh Amendment is often erroneously thought to have been adopted on January 8, 1798, the date that President Adams transmitted a message to Congress stating that three-fourths of the states had ratified the proposed amendment. *See, e.g.*, C. Warren, 1 *The Supreme Court in United States History* 1789-1918, 101 (1922 ed.) (hereinafter "Warren"). That message was incorrect in several respects, and in fact came nearly three years after the twelfth state had ratified the amendment. Jacobs at 67; Mathis, at 227 n.77. Professor Warren observed that "ratification was promulgated" in an "extremely informal and careless manner." Warren, at 101 n.2.

The Trade and Intercourse Act of 1793 was enacted after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), and before the ratification of the Eleventh Amendment, a chronology with potentially important implications for the resolution of this matter. *See* text, *infra*, at 19.

had waived its immunity by the act of operating a railroad. It first noted that "[b]y empowering Congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Id.*, 377 U.S. at 192. It then held that Congress, in enacting the FELA, intended to subject all operators of railroads to suit under the act, and that by choosing to operate a railroad in interstate commerce after enactment of the statute, Alabama had in effect consented to be sued. The Court dismissed the argument that Alabama had not waived its immunity under its own state laws. "[W]hen a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.*, 377 U.S. at 196.

In *Employees*, the Court ruled that the principle established by *Parden* did not automatically extend to all exercises of congressional power under the Commerce Clause. *Employees* involved a suit brought by employees of Missouri state hospitals against the state under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. The Court held that Congress' extension of the coverage of the FLSA to state employees in 1966 did not constitute intent to waive the states' Eleventh Amendment immunity in suits brought under the Act. The Court distinguished *Parden* on the grounds that it involved a proprietary enterprise which was "rather isolated" and outside the scope of traditional activity. 411 U.S. at 284-85. While the Court noted that Congress possessed the constitutional power to waive the states' immunity to suit under circumstances such as those presented in *Employees*, it held that clear evidence of such Congressional intent would be required before finding such a waiver. *Id*. The Court examined the statutory framework and concluded that no such evidence existed.

Justice Marshall, concurring in the result, expanded on the difference between *Parden* and *Employees*. In the latter case, he noted,

> the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or "consenting" to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. . . . In *Parden*, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case.

Id., 411 U.S. at 296-97 (citation and footnote omitted).

Thus, in *Parden*, Congress had enacted a statute regulating a particular field, in which the participants were typically private individuals; afterwards, the state, with knowledge of the statutory framework, engaged in proprietary activity in that field. The state was thereby held to have waived its sovereign immunity. In *Employees*, the state had been engaging in a vital and traditional governmental activity for many years when Congress sought to regulate those activities for the first time. The Court simply held that clear evidence of Congressional intent to subject the state to liability would be required, and none was forthcoming.[11]

[11]Such clear evidence was later found by the Court in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (suits under Title VII of the Civil Rights Act of 1964) and in *Hutto* v. *Finney*, 437 U.S. 678 (1978) (award of attorneys' fees under Civil Rights Attorneys' Fees Awards Act of 1976). *Fitzpatrick* noted an additional source of congressional authority to waive the Eleventh Amendment immunity of the states: Section 5 of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 5.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Court noted an additional requirement for a finding of constructive waiver. *Edelman* involved a claim by a private party that the State of Illinois was improperly administering a federal-state program of Aid to the Aged, Blind, or Disabled. The plaintiff argued that the State had waived its Eleventh Amendment immunity participating in the federal program. The Court refused to find such a waiver, and distinguished its prior holdings:

> Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. . . . The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.
>
> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* . . . as well.

Id., 415 U.S. at 672 (footnote omitted). The Court went on to hold that "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." *Id.*, at 673. *Accord*, *Florida*

Dept. of Health v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam).

Thus, the analytic framework established by *Parden*, *Employees*, and *Edelman* in determining whether a state has waived its immunity may be described as follows. First, under *Edelman*, the Court must find that the congressional enactment in question literally applies to the activity of the state. Second, the Court must determine whether that activity is governed by *Parden* or *Employees*. If it is the latter, the Court must find clear evidence of congressional intent to subject the state to liability or the rule of constructive waiver will not apply.

The threshold requirement of *Edelman* is easily satisfied here. The Trade and Intercourse Act of 1793, by its terms, applies to *any* "purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians." That statute literally encompasses purchases made by a state, and has been held to apply to such purchases. *See Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 626 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).[12] Indeed, if that statute does *not* apply to the purchase of Indian land by a state, this entire lawsuit should be dismissed, for no violation of law has occurred.

While the 1793 Act does not expressly authorize the institution of a civil suit against a state, it also does not expressly authorize civil suits against the Counties or any other party. If the 1793 Act is to be read literally, the Oneidas' principal claim fails, and the Eleventh Amendment need not be addressed. If, however, rights are to be read into the statute, it would be grossly unfair to conclude that the statute authorizes suit against a class of defendants which includes the Counties and other

[12] This Court's 1974 decision in this action, in fact, was premised on the assumption that the Trade and Intercourse Act applied to the State's purchase. 414 U.S. 661 (1974).

innocent landowners, but which does not include the State, the entity which actually violated the statue.

A further point should be noted. The Trade and Intercourse Act of 1793 was enacted *after* this Court ruled in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793) that states were not immune from suit in federal courts, and *before* the ratification of the Eleventh Amendment, which reversed that result. *Chisholm* was decided on February 18, 1793, 2 U.S. at 249; the statute was enacted on March 1, 1793, 1 Stat. 329; and the Eleventh Amendment was ratified on February 7, 1795. *See* text, *supra*, at 13 n.10.

The Congress which enacted the 1793 Act must be presumed to have known — and undoubtedly did know, in light of the firestorm of controversy surrounding *Chisholm* — that the federal judiciary then considered the states to be generally subject to suit in federal courts. Accordingly, clear indication of congressional intent to subject the states to suit should *not* be required; rather, an expression of intent to *immunize* the states from suit under the 1793 Act should be required. To hold otherwise is to require clear congressional intent to abrogate an amendment which had not yet been adopted.[13]

Having satisfied the initial requirement of *Edelman*, the second level of inquiry is whether this action more closely resembles *Parden* or *Employees* for purposes of determining whether a constructive waiver has occurred. The Counties submit that this action is closely analogous to *Parden*, and in fact presents a more compelling set of circumstances for a finding of waiver than even *Parden* itself.

First, like *Parden*, this action involves a proprietary activity, undertaken chiefly for the purpose of making a profit. As the Court of Appeals noted, the State quickly resold the land purchased from the Oneidas at fifty cents per acre to white land speculators and settlers for approximately $3.53 per acre,

[13] The foregoing, of course, assumes that private rights of action are available under the 1793 Act, a point which the Counties by no means concede.

a profit exceeding 700%. 719 F.2d at 529. (Jt. App. at 213a).[14] The State was therefore voluntarily acting as a private participant in the marketplace, not as a sovereign authority. *See Mills Music, Inc.* v. *Arizona*, 591 F.2d 1278, 1286 (9th Cir. 1979) (state adopted copyrighted song as theme for state fair; constructive waiver found).[15]

Second, this action does not involve traditional or core state governmental activity, such as the maintenance of hospitals and asylums or the operation of a public welfare system. *Cf. Employees* v. *Dept. of Public Health & Welfare of Missouri, supra*; *Edelman* v. *Jordan, supra*. Federalism concerns which dominate Eleventh Amendment jurisprudence are far less compelling in such a context.

Third, the statutory framework at issue was already in place at the time of the activity. The Trade and Intercourse Act was enacted in 1793, and the purchase of Oneida land took place in 1795. Indeed, the State had *actual* — not just constructive — knowledge of the 1793 Act, and transacted with the original Oneida Nation in deliberate disregard of its prohibitions. 434

[14] The State suggests that it acted as a sovereign, rather than a proprietor, because it purchased the land in order to make it available for settlement. State's Brief, at 42 and note. The question of whether a state's activity was undertaken as a sovereign or as a proprietor (or, more accurately, where such activity falls on a sovereign-proprietor continuum) cannot be resolved by simply determining whether *any* public purpose was served by the activity. Alabama's operation of a railroad in *Parden*, for example, undoubtedly served the public purpose of facilitating commerce in the port of Mobile. In the present case, the State did not give the land away or resell it at cost, which would have been the logical means to promote rapid settlement; it quickly resold most of it to speculators at an enormous profit. The State's actions stand in sharp contrast to such legislative programs as the Homestead Act, now codified at 43 U.S.C. §§ 161 *et seq.*, where public lands were made available for settlement at little or no cost.

[15] The State's acquisition of the fee was an exercise of a proprietary right (the right of preemption), not a sovereign right (the right of extinguishment). *See, e.g.*, 414 U.S. at 666-675; *Mohegan Tribe* v. *Connecticut, supra*, 638 F.2d at 616-617.

F.Supp. at 534-535. (Jt. App. at 55a-57a.) It therefore transacted with the Oneida Nation with its "eyes wide open." *Edelman* v. *Jordan, supra*, 415 U.S. at 693 (Marshall, J., dissenting); *accord, County of Monroe* v. *Florida*, 678 F.2d 1124, 1134-35 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983) (federal extradition statute); *Mills Music, Inc.* v. *Arizona, supra*, 591 F.2d at 1286 (federal copyright statute).

Fourth, Congress has been granted specific authority under the Constitution "to regulate commerce . . . with the Indian tribes." Art. I, § 8, cl. 3. One of the concerns expressed by the court in *Employees* was that congressional legislation under the Interstate Commerce Clause has "grown to vast proportions in its applications," and that accordingly the Court should not lightly infer that Congress intended such regulation to supersede state immunities. 411 U.S. at 285. This action, however, does not involve railroads, labor wages, or any of the panoply of other fields into which Congress has moved under its power to regulate interstate commerce, and which could not have been foreseen by the drafters of the Constitution. It involves a *specific* power delegated by the states, including New York, to Congress. *See County of Monroe* v. *Florida, supra*, 678 F.2d at 1133 (states specifically relinquished sovereignty in matters relating to extradition to Congress); *Mills Music, Inc.* v. *Arizona, supra*, 591 F.2d at 1285 (same, in matters relating to copyrights and patents). Accordingly, congressional abrogation of New York's immunity in this instance will not run counter to the constitutional plan, or to basic precepts of American federalism.

Fifth, and in stark contrast to *Parden*, the activity in question here was not simply subject to federal regulation; it constituted a federal crime. The deliberate commission of a federal crime surely deserves no greater deference from the federal judiciary than the negligent operation of a railroad in interstate commerce.

Finally, unlike *Employees*, a finding of waiver here will not have sweeping implications reaching to the very heart of state governmental sovereignty. While the potential liability may be large, liability will only be found where the State has illegally purchased Indian land; that activity, at most, is a rare occurrence today, and is not an essential element of state government operations. *See Mills Music, Inc.* v. *Arizona*, *supra*, 591 F.2d at 1285 (states will infrequently engage in ownership or infringement of copyright).

The State suggests that, even if a waiver is found, it should only extend to a direct suit brought by an Indian tribe, and not to a third-party suit brought by non-Indians. State's Brief, at 40, note. That argument, however, seeks to have the Court draw meaningless distinctions among parties and procedural contexts, with no foundation in logic or policy.

The fact that the Counties are suing the State on a third-party claim, rather than directly, should have no effect on whether or not the State is immune. Third-party practice is simply a procedural device which can neither expand nor limit the substantive rights of the parties. Thus, in *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 553-55 (1951), the Court held that where the United States had consented to suit under the Federal Tort Claims Act, such a suit could be asserted as a third-party claim as well as directly.

> Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy." [*Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29 (1926)].

340 U.S. at 554.

Similarly, the fact that the Counties are not Indians should not command a different result. The State's transaction with the original Oneida Nation has affected *both* the Oneidas and the Counties, not just the Oneidas. If the concept of constructive waiver has any vitality, it should apply to all suits against a state arising directly out of the activity leading to the waiver; anything less is simply an artificial distinction among potential claimants. As Judge Cardozo stated in *Anderson* v. *Hayes Construction Co.*, *supra*, 243 N.Y. at 147, 153 N.E. at 29-30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Moreover, it is important to recall that the State specifically purchased the land for resale to third parties. The State's actions were thus intended to involve third parties from the first, and it should have been obvious to the State that an innocent third party would be a likely target of litigation to undo the illegal transaction.

In summary, the State utterly abandoned "the sphere that was exclusively its own" by transacting with the original Oneida Nation in 1795. *Parden* v. *Terminal Ry. of Alabama*, *supra*, 377 U.S. at 196. Had the State wished to limit its exposure to potential liability for violation of the Trade and Intercourse Act, it could have simply refrained from purchasing the land. It chose, however, not to do so, and its action has injured the Counties and every other innocent landowner. The State should be forced to bear the expense of redressing that injury.

• • •

As noted in the Counties' brief as petitioners in No. 83-1065, this litigation is truly extraordinary. The alleged wrong occurred nearly two centuries ago; the wronged party no longer exists; and the defendants are innocent landowners who had nothing whatsoever to do with that wrong. Thousands of similarly situated landowners now face bankruptcy and eviction from their property in order to vindicate the legislative purpose of preserving peace on the Indian frontier. If those landowners are denied the right to indemnity from the State — the party which actually violated the Trade and Intercourse Act of 1793 — this lawsuit will result in one of the most senseless and unfair judgments in the history of American jurisprudence. The Counties respectfully urge that this Court, at a minimum, place liability where it rightfully belongs.

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the State, should be affirmed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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Nos. 83-1065 and 83-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF ONEIDA, NEW YORK,
COUNTY OF MADISON, NEW YORK,
Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
and STATE OF NEW YORK,
Respondents,

STATE OF NEW YORK,
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
COUNTY OF ONEIDA, NEW YORK and
COUNTY OF MADISON, NEW YORK,
Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT ONEIDA OF THE THAMES BAND COUNCIL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1065

COUNTY OF ONEIDA, NEW YORK,
COUNTY OF MADISON, NEW YORK,
Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
and STATE OF NEW YORK,
Respondents,

No. 83-1240

STATE OF NEW YORK,
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
COUNTY OF ONEIDA, NEW YORK and
COUNTY OF MADISON, NEW YORK,
Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT ONEIDA OF THE THAMES BAND COUNCIL

STATEMENT OF THE CASE

This action seeks to redress an historic and continuing wrong, the purported conveyance of land belonging to the Oneida Nation in violation of federal law. The respondents are the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council [hereinafter "the Oneidas"]. The complaint asserted a cause of action for trespass damages against the County of Oneida and the County of Madison, New York, for the years 1968 and 1969 [hereinafter the petitioners in 83-1065 are referred to as "the Counties"]. The Counties are the record owners of 871.92 acres of land which the Oneidas claim to own under federal law. No other defendants are sued and no other form of relief is sought.

The essence of the Oneidas' claim is that they have been wrongfully deprived of their land in violation of federal law. The complaint allegrs that, in 1795, the State of New York acquired a tract of treaty-guaranteed Oneida land, including the area which is the subject of this suit, in violation of the federal Trade and Intercourse Act of 1793. 1 Stat. 329. That Act, which was purposefully designed to guarantee the security of Indian lands, invalidated any conveyance of Indian land not made by treaty pursuant to the authority of the United States. Since the 1795 transaction was not authorized or approved as required by the Act, the complaint alleges that the deed purporting to convey title was void and neither the State of New York nor the Counties, as successors, acquired any rights in the subject land. Thus, damages are sought for the unlawful use and occupancy of the subject land by the Counties.[1]

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[1] The complaint also asserted that the subject land had been acquired by the State in violation of federal treaty guarantees. In view of the district court's ruling that the Counties are liable under the Trade and Intercourse Act, this claim was not reached. 434 F.Supp. 527, 537, n. 19 (N.D. N.Y. 1977) (Joint Appendix at 61a) (hereinafter "J.A.").

Initially, the District Court dismissed the claim for lack of federal question jurisdiction in 1971 and the Court of Appeals affirmed in a split decision. 464 F.2d 916 (2d Cir. 1972) (Lumbard, J., dissenting). This Court, in a unanimous decision, reversed, holding that federal question jurisdiction rests on the "not insubstantial claim" that federal law protects the Oneidas' legal interest in the subject land, apart from the application of state law. 414 U.S. 661, 667 (1974). On remand, the Counties filed third-party complaints for indemnification from New York State, petitioner in 83-1240 [hereinafter "the State"].

On the basis of uncontradicted evidence, the District Court found that the Oneidas had proven a *prima facie* violation of the Trade and Intercourse Act. 434 F. Supp. at 40 (J.A. at 68a). The court found that the subject land was part of the Oneidas' aboriginal land and was secured by three federal treaties. 434 F. Supp. at 538 (J.A. at 63a).

The court found that the 1795 conveyance was surrounded by irregularities. The State knew it was violating the Trade and Intercourse Act by negotiating with the Oneidas, and none of the individuals who signed was an Oneida chief and none was properly authorized to sign. 434 F. Supp. at 534-535 (J.A. at 57a). The court concluded that "[t]he proof clearly establishes that the United States never consented to the 1795 purchase." *Id.* The court also found that the Oneidas "never abandoned their claim to their aboriginal homeland and never acquiesced in the loss of their land, but have continued to protest its diminishment up until today." 434 F. Supp. at 541 (J.A. at 71a). As a result, the court held that under the terms of the Trade and Intercourse Act, the Oneidas' "right of occupancy and possession to the land in question was not alienated." 434 F. Supp. at 548 (J.A. at 84a). The Counties, as successors to the State, were held liable as trespassers.

After a trial on damages, the District Court awarded $9,060 in damages against Madison County and $7,634 in damages against Oneida County, plus annual interest at 6% (J.A. at 177a). The court allowed the Counties an offset for alleged good-faith occupancy. The court then held the State liable to indemnify the Counties for the full amount of the judgment.

The Court of Appeals affirmed all aspects of the District Court's ruling on liability but remanded for further proceedings on the calculation of damages. In an opinion by Senior Circuit Judge Lumbard, joined by Judge Mansfield, the court held that a common law right of action was available, and that a right of action is properly inferred from the Trade and Intercourse Act of 1793. The court rejected the Counties' defense of abatement, statute of limitations, non-justiciability and subsequent federal ratification. The judgment against the State was affirmed. Judge Meskill dissented.

SUMMARY OF ARGUMENT

The Oneidas have a cause of action under the federal common law for damages against the Counties for their unlawful use and occupation of Oneida land. The right of action, uniformly recognized by this Court and lower federal courts, is available to the Oneidas as owners of the subject land. Congress did not intend to preempt this right of action by the Trade and Intercourse Act of 1793 or any later Act, none of which addresses the question of remedies available to Indian tribes.

The Oneidas' title to the subject land is protected by § 8 of the Trade and Intercourse Act of 1793. It is clear from the relevant factors identified by the decisions of this Court that Congress intended § 8 to be enforceable through lawsuits by Indian tribes.

The Oneidas' right of action, under the common law and the statute, has not abated because the relevant provision of the Act has been in continuous force. Nor is this action barred by any state or federal statute of limitations. New York's statute of limitations is not properly borrowed as a matter of federal law because it would be inconsistent with the policies of the Trade and Intercourse Act and the federal policy of preserving Indian land rights.

The 1795 conveyance has not been validated by the Treaty of 1798 nor the Treaty of 1802. The enigmatic references to previously transferred lands cannot be regarded as plain and unambiguous approval of the 1795 conveyance.

This case does not raise nonjusticiable political questions. There has been no constitutional commitment of the Oneidas' claim to either Congress or the President. Neither has the Congress nor the President made a decision demanding the Court's unquestioning adherence.

ARGUMENT

In 1795, the Oneidas were dispossessed of 100,000 acres of their aboriginal land in violation of federal law. The Oneidas have worked persistently since then to correct that wrong, the economic and social effects of which are still felt today.

It is undisputed that the Oneidas owned the subject land by aboriginal right and treaty guarantee and that under federal law the validity of Indian land conveyances depends on proper authorization and approval by the United States in the manner established by the Trade and Intercourse Act. No one disputes the finding of the courts below that the Act of 1793 was violated by the 1795 conveyance. Thus the Counties, whose claim of ownership admittedly derives from the 1795 conveyance, never acquired valid title to the subject land, and the Oneidas are entitled to trespass damages for the Counties' wrongful occupation and use of Oneida land.

The Trade and Intercourse Act of 1793 was designed to prevent the kind of wrong by which the Oneidas lost their land in 1795. As the Court of Appeals noted, the circumstances surrounding the transaction were "fraught with irregularities." 719 F.2d at 525 (J.A. at 212a). The State of New York negotiated with certain Oneida individuals, who were not chiefs nor authorized to cede land, knowing that its actions violated the 1793 Act. The Oneidas received fifty cents per acre for the land, while the State sold much of it within two years for $3.53 per acre. 791 F.2d 529 (J.A. at 213a).

The Oneidas are not seeking to take advantage of a mere technical violation of a federal statute. The wrong is not, as the Counties suggest, that no federal commissioner was present at the 1795 transaction. Rather, the crux of the Oneidas' case is that the purported conveyance was not "made by a treaty or convention entered into pursuant to the constitution" and therefore is void. Trade and Intercourse Act of 1793, § 8. This case seeks to vindicate the longstanding federal policy to protect Indian land rights.

The Counties and State are asking in effect that this Court nullify the Oneidas' rights under the Trade and Intercourse Acts because of the supposedly catastrophic consequences of applying the law. This is a case of great importance and great consequence for thousands of Indians and non-Indians alike, but the consequences feared by the Counties and the State could arise, if at all, only from some future case, not this one. This case involves the issue of trespass damages against two governmental entities for the years 1968 and 1969. The right of the Oneidas to recover damages against individual owners has not been litigated and is therefore not established. More important, the availability of an ejectment remedy against the Counties or any other defendant has not been litigated or established. There is no doubt that these issues would be strongly contested, even if the Oneidas

are successful here. This cannot be an appropriate case in which to consider the issues of ejectment and the rights of individual owners. When and if those issues are litigated in some future action, then it may be appropriate for this Court to resolve them. It may never become necessary to decide these troubling issues.

Moreover, this case involves only the validity of the 1795 conveyance. The validity of the other Oneida land transactions with New York, alluded to by petitioners, is not at issue here and has not been litigated.[9]

The lower federal courts have shown a willingness to take into account the potential political and economic consequences of Indian land claims in formulating relief. In *Oneida Indian Nation of New York* v. *New York*, 520 F. Supp. 1278, 1295-1297 (N.D. N.Y. 1981), where recovery of a large tract of land is sought, the district court indicated that equitable considerations would partly determine the formulation of relief. In *Cayuga Indian Nation of New York* v. *Cuomo*, 565 F. Supp. 1297, 1308 (N.D. N.Y. 1983), the district court noted that, "should plaintiffs ultimately prevail, the utmost circumspection and restraint will be employed in fashioning an appropriate remedy."

Affirmance of the decision below would not result in the mass ejectment imagined by the Counties and the State, since the Oneidas have not sought such a result and would have no reason to seek such a result. Rather, respondents have always sought and still seek an agreed-upon settlement of these claims, approved by Congress. If this case were affirmed, the Oneida respondents would continue to seek that result because there would remain very powerful incentives to reach a negotiated settlement.

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[9] Oneida Indian Nation of New York v. New York, 691 F.2d 1070 (2d Cir. 1982), rests on a different legal theory and facts, namely that the alienation of Oneida land in 1785 and 1788 is void for violation of a congressional proclamation under the Articles of Confederation and a federal treaty.

in particular, Congress could seek to extinguish the claims legislatively. This has been proposed in the past. *See, e.g.*, the bill entitled "The Ancient Indian Land Claims Settlement Act of 1992," H.R. 5494 and S. 2084, 97th Cong., 2d Sess. (1992).

Whether Congress has the power, consistent with the Constitution, to extinguish claims such as this has not been decided, but this Court and many other authorities have upheld such exercises of congressional power in other situations. *See, e.g., United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 408 (1980), *quoting Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); N. Newton, "Federal Power Over Indians: Its Sources, Scope and Limitations," 132 *U. Pa. L. Rev.* 195 (1984). Respondents do not, of course, concede Congress' power to extinguish their claims and reserve the right to challenge the constitutionality of any such congressional action. Nevertheless, the very real and practical threat of adverse congressional action is a powerful incentive to seek an agreed-upon settlement rather than to press solely for judicial relief.

I. THE ONEIDAS HAVE A CAUSE OF ACTION UNDER FEDERAL COMMON LAW

The Court of Appeals held that the Oneidas have a federal common law right of action to enforce the Trade and Intercourse Act of 1793.[8] As owners of the subject land, the Oneidas have a common law right of action for damages against trespassers.

It is a fundamental legal principle under the common law that owners of land may pursue judicial remedies to enforce their property rights. As the Court explained

[8] The Counties and the State do not challenge the finding of the lower courts that the State of New York acquired the subject land in 1795 in violation of the Trade and Intercourse Act of 1793.

in *Green* v. *Biddle*, 8 Wheat. 1, 75-76 (1823): "The common law of England was . . . that a right of land, by that law, includes the right to enter on it when the possession is withheld from the rightful owner; to recover the possession by suit, to retain the possession, and to receive the issues and profits arising from it." Thus, as owners of their land, Indian tribes are entitled to pursue the full range of remedies provided by federal common law. The Court recognized as much in *Marsh* v. *Brooks*, 8 How. 223, 232 (1850), when it said: "That an action in ejectment could be maintained on an Indian right to occupancy and use is not open to question." If the interest of Indian tribes is sufficient to sustain a right of ejectment, surely a right of action for damages is likewise available.[4]

In its 1974 decision in this case, the Court recognized the legal principles on which a federal common law right of action is based. *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661 (1974). These principles are that Indian nations or tribes[5] have a legally enforceable "right of occupancy" in their lands which is "good against all but the sovereign" and can be lawfully extinguished, if at all, only by the United States. *Id.* at 667. Moreover, the Court reaffirmed the long-standing principle that "federal law now protects and has continuously protected from the time of the formation of the United States, possessory right[s] to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.* at 677. The role of the federal

[4] The Counties assert that *Marsh* is not relevant because it originated in state court. Brief of Counties at 25, n. 12. That fact is not a valid basis on which to distinguish *Marsh*. The Court in *Marsh* relied upon Johnson v. M'Intosh, 8 Wheat. 543 (1823) and applied the principles of *federal* common law established in *Johnson*.

[5] Hereinafter these terms are used interchangeably.

common law in protecting these rights was expressly recognized: ". . . absent federal statutory guidance, the governing rule would be fashioned by the federal court in the mode of the common law." *Id.* at 674.

As the Court of Appeals noted, the Court's 1974 decision appears to recognize, though it does not hold, that a federal common law action is available in this case. 719 F.2d at 530 (J.A. at 216a). Significantly, it was not only the allegation of a right to possession and damages originating in federal law which led the Court in 1974 to find federal question jurisdiction. The Court noted that this case was distinctly different from cases where litigants have unsuccessfully sought to convert an ordinary ejectment action into a federal case by the "mere allegation of a federal source of title." 414 U.S. at 683-684 (Rehnquist, J., concurring). The federal policy of according legal protection to Indian land rights was the basis on which the Court distinguished this case from the ordinary ejectment action.

The Court's 1974 decision follows a long line of decisions recognizing that Indian tribes have legally enforceable rights in their lands. In *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574 (1823), the Court acknowledged Indian tribes to be "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." Again in 1835, the Court made clear that the interest of Indian tribes in their land is a legal right, noting that the right of occupancy is "as sacred as the fee simple of the whites." *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835). As against third parties, then, legal interests in Indian land are "accorded the protection of complete ownership . . . ." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946).

The Oneidas assert a present-day federal common law right of action for trespass on their land in 1968 and 1969. There is abundant modern legal authority recog-

nizing this common law action. This principle was affirmed by the Court in *United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941), where a common law right of action for an accounting of all "rents, issues and profits" was upheld against trespassers on land which Indians still owned. As Felix Cohen, the preeminent authority on federal Indian law, has noted: "Ordinary trespass remedies are available to Indian tribes to prevent trespasses upon their land and to recover damages for injuries arising out of such trespasses." F. Cohen, *Handbook of Federal Indian Law*, 524 (1942).

In recognition of the enforceability of Indian land rights, the lower federal courts also have consistently upheld the right of Indian tribes to maintain actions for trespass damages. In *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973), the district court recognized that certain Alaskan Native villages had causes of action in trespass against third parties who entered Indian land under color of invalid title or of unlawfully issued permits prior to the Alaska Native Claims Settlement Act of 1972. The same right is upheld in *Inupiat Community of the Arctic Slope* v. *United States*, 680 F.2d 122, 128-129 (Ct. Cl. 1982), *cert. denied*, 103 S. Ct. 299 (1982) (the right to sue for trespass is one component of the set of rights Indian title provides). *See also United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976) (granting damages remedy against railroad which failed to acquire lawful easement or right-of-way over the reservation). The rationale of these cases appears to be that a common law right of action is available in order to effectuate the policy of the United States of protecting Indian land rights. *See United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339, 345 (1941). That rationale applies with equal force to this case.

For their argument that there is no federal common law right of action here, the Counties rely primarily on

the alleged absence of any federal common law before 1842. Brief of Counties at 25, n.20. Whatever the state of the law in other areas may have been, it is beyond dispute that Indian land rights from the beginning were governed by principles of federal law, which were often judge-made. The unique federal nature of Indian land rights was recognized as early as 1823 in *Johnson* v. *M'Intosh*, 8 Wheat. 543 (1823). Regarding the question of whether grants of land by certain Indian nations to a private individual superceded a later sale by the same nations to the United States, the Court had this to say about the source of the governing law:

> . . . as the title to lands, especially is, and must be, admitted, to depend entirely on the law of the nation in which they be; it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice . . . which are admitted to regulate, in a great degree, the rights of civilized nations, . . . ; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

8 Wheat. at 572. *See also Worcester* v. *Georgia*, 6 Pet. 515 (1832) (principles of federal common law applied, along with treaties, statutes and the Constitution, in holding that the laws of Georgia may not extend over the territory of the Cherokee Nation).

II. THE ONEIDAS' COMMON LAW RIGHT OF ACTION HAS NOT BEEN PREEMPTED

Relying on *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("Milwaukee II"), the Counties and the State argue that the Oneidas' common law right of action was preempted by the Trade and Intercourse Act of 1793. Emphasizing unrelated provisions regarding land, trade and criminal jurisdiction, the Counties and the State argue that the 1793 Act was as comprehensive as the

statute found to preempt federal common law in *Milwaukee II*.

In determining a question of preemption, the relevant inquiry is whether the legislative scheme "speaks[s] directly" to the question of common law remedies—if so, whether Congress has "affirmatively and specifically" enacted rules governing the issue. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1977). In this case, the question is whether Congress in the 1793 Act spoke directly to the question of remedies available to Indian tribes to enforce the Act. Because the Act does not address that issue, the Court of Appeals correctly held that the Oneidas' common law remedies are not preempted. 791 F.2d at 531 (J.A. at 218a).

None of the reasons which led the Court to find preemption in *Milwaukee II* apply to the Trade and Intercourse Act. *Milwaukee II* considered the effect of the Federal Water Pollution Control Act Amendments of 1972 on the federal common law of nuisance regarding interstate water pollution. The Court held that the common law remedies had been preempted because Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. The Court relied on the abundant evidence in the legislative history that Congress intended to establish a comprehensive, all-encompassing water pollution scheme with detailed and elaborate enforcement mechanisms. 451 U.S. at 317, 318.*

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*The statute in *Milwaukee II* prescribed in great detail the remedies available to the federal government or in private suits, established notice requirements as a condition to filing suit, established a range of monetary penalties for violations, contained special jurisdictional provisions, and established an elaborate administrative apparatus to administer the new program. The Court noted that Congress viewed the 1972 Amendments as a total restructuring of existing water pollution legislation. 451 U.S. at 318.

By contrast, the relevant provisions of the Trade and Intercourse Act of 1793 are far less comprehensive and detailed.[7] Nor is there any evidence in the legislative history, comparable to that relied on in *Milwaukee II*, to suggest that Congress intended the 1793 Act to preempt common law remedies.

The strongest indication that Congress did not intend to preempt common law remedies is the fact that the Act says nothing at all about the question of what remedies would be available to Indian tribes. Nor did the Act address the question of enforcement of the Act by States or land companies. There are many other areas not addressed in the Act. For example, there is no provision for regulating or redressing the unlawful removal of natural resources from Indian lands. Nor does the Act cover the question of rights-of-way or the building of roads through Indian territory. It contains no provision governing hunting or the grazing of livestock on Indian lands.

In short, Congress did not enact a comprehensive scheme concerning Indian land. Inferring an intent to preempt the common law is particularly inappropriate when the statutory scheme is so simple and when enforcement mechanisms are so rudimentary. By recognizing a common law right of action for damages, the Court would not be "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 625.[8]

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[7] Only two provisions concern rights in Indian land. Section 5 imposed a small fine and imprisonment for settling on Indian lands and authorized the President to remove persons unlawfully settling on Indian lands. Section 8, the provision at issue in this suit, prohibited the acquisition of Indian lands without the authority and approval of the United States and imposed a fine of $1,000 and imprisonment on any person attempting to acquire Indian lands without such authority.

[8] The Counties argue that the Court has found preemption in statutes which were "far less imposing" than the 1793 Act, citing

None of the Trade and Intercourse Acts enacted after 1793 can be read to have preempted the common law right of action. None addresses the question of remedies available to Indian tribes, and none enacts a comprehensive regulatory and remedial scheme concerning Indian land rights.

Apart from the narrow scope of the statutes, there is additional evidence that Congress intended to preserve the common law remedies. In 1822, Congress amended the 1802 Trade and Intercourse Act to provide that "[i]n all trials about the right of property in which Indians shall be a party on one side, and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title . . . ." Act of May 6, 1822; 3 Stat. 683; 25 U.S.C. § 194. This provision has been construed to include Indian tribes. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665-66 (1979). Thus, Congress plainly contemplated that common law rights of action would be available to enforce Indian land rights. If Congress had, as the Counties and State claim, preempted all common law actions in 1793, the 1822 Amendment appears to have been unnecessary.

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) (Death on the High Seas Act) and Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981). Counties' Brief at 36. These cases are readily distinguishable. Although the statute in *Mobil Oil Corp.* did not address every issue of wrongful-death law, it did address the question of the measure of damages so thoroughly that an intent to preclude supplemental damages remedies could easily be inferred. By contrast, the Trade and Intercourse Act of 1793 did not directly address the question of a right of action at all. *Northwest Airlines, Inc.* was not strictly a preemption case. There the question was whether the Court should fashion a federal common law right of action which did not exist previously. The Court refused to do so, partly because Congress had enacted "a comprehensive legislative scheme including an integrated system of procedures for enforcement." 451 U.S. at 97. Again, the comprehensive nature of the statutes determined the Court's understanding of Congress' intent.

III. THE ONEIDAS HAVE A RIGHT OF ACTION UNDER THE TRADE AND INTERCOURSE ACT OF 1793

The Oneidas also have a right to sue implied in the 1793 and later Trade and Intercourse Acts. It is clear, considering all the relevant factors identified by the decisions of this Court, that Congress intended § 8 of the Trade and Intercourse Act to be enforceable through lawsuits by Indian nations and tribes.

In determining whether a cause of action is implied in a federal statute, the key inquiry is "the intent of Congress when it enacted the statute in question." *Daily Income Fund, Inc.* v. *Fox*, —— U.S. —— 104 S. Ct. 831, 839 (1984). The relevant factors, as elaborated by the Court are: a). the state of the law and the legal context at the time of the legislation. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982); *Cannon* v. *University of Chicago*, 441 U.S. 667, 698-699 (1979); b). the identity of the class for whose particular benefit the statute was passed; c). the legislative history; d). the purpose of the statute; e). the traditional role of the states, if any, in affording the relief sought; f). the existence of express statutory remedies adequate to serve the legislative purpose. *Daily Income Fund, Inc.* v. *Fox*, —— U.S. ——, 104 S. Ct. 831 (1984); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

A. The State of the Law and Legal Context

In determining congressional intent, "the initial focus must be on the state of the law at the time the legislation was enacted." *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 378. The analysis of the intent of Congress in enacting the Trade and Intercourse Act of 1793 "must take into account its contemporary legal context." *Cannon* v. *University of Chicago*, 441 U.S. at 698-699.*

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*The requirement to take into account the contemporary legal context is part of the analytical framework adopted by the Court in Cort v. Ash, 422 U.S. 66 (1975). *See* Cannon v. University of Chicago, 441 U.S. at 698-699.

That Congress intended section 8 of the 1793 Act to be enforced through civil suits by Indian tribes is readily apparent from the legal context of that day. At the time the statute was enacted, it was well established as a general proposition that a right of action was available to any person who suffered injury by reason of a violation of a statute. Numerous authorities establishing and applying this rule are discussed by Justice Stevens in his concurring opinion in *California* v. *Sierra Club*, 451 U.S. at 300, n.2. Thus, in 1793, federal courts generally inferred a right of action whenever the plaintiff could show that the statute conferred rights or special benefits on a class of persons of which he was a member. This common law practices explains why Congress seldom, if ever, provided expressly for private rights of action in statutes during that period. Since Congress would have understood that a right of action would be available, it was unnecessary to spell it out in the statute itself. As the Court observed in *Cannon* v. *University of Chicago*, 441 U.S. at 696-697, "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law."*

The Counties and the State suggest that Congress could not have intended that a private right of action would be available because at the time, they claim, federal courts lacked jurisdiction over suits by tribes and, in any event, tribes lacked capacity to sue. Brief of Counties at 20-21, n.18; Brief of State at 23-24. This argument is erroneous on several legal and historical grounds.

First, the dispositive factor here is Congress' perception of the state of the law, not whether Congress cor-

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*This is particularly true in the case of Indian legislation, as the Court has recognized: "[Indian statutes] cannot be interpreted in isolation but must be read in light of the common notions of the day and assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

rectly perceived the state of the law. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 378, n.61 (1982). Because of the state of the law in 1793 and the years following, Congress could not reasonably have perceived that federal courts lacked jurisdiction or that tribes lacked capacity to sue.

Before the decision in *Cherokee Nation* v. *Georgia*, 5 Wheat. 1 (1831), it would have been reasonable to assume that Indian nations could invoke the original jurisdiction of the Court as a "foreign state" under article III of the Constitution. Indeed, Chief Justice Marshall observed in *Cherokee Nation* that Indian nations had "been uniformly treated as a state, from the settlement of our country." 5 Wheat. at 11. Congress was no doubt aware of the status of Indian nations as states[11] and may well have perceived them as sufficiently foreign to the United States to permit suits under the original jurisdiction of the Supreme Court. In *Cherokee Nation*, Justice Thompson, dissenting, noted that from 1775 to the time of the case, the executive and legislative branches had treated Indian tribes as sovereign nations which were foreign in the sense of being under a different government. 5 Wheat. at 57.

Furthermore, Section 11 of the Judiciary Act of 1789 gave federal courts original jurisdiction "of all suits of a civil nature at common law or in equity where . . . an alien is a party." 1 Stat. 73. This provision conferred jurisdiction over suits by aliens against citizens of the states. *Hodgson* v. *Bowerbank*, 4 Cranch 303 (1809). Indians were aliens, not citizens, unless citizenship had been acquired by treaty or statute. F. Cohen, *Handbook of Federal Indian Law*, 153-156 (1942). There were no such treaties or statutes at the time the 1793 Act was enacted. At least before *Cherokee Nation* in 1831, Con-

[11] Treaties, approved by the Senate and ratified, were the usual means for dealing directly with Indian nations or tribes, and the Trade and Intercourse Acts required that future land transactions be by treaty entered into pursuant to the Constitution.

gress may well have viewed this provision as a basis for federal court jurisdiction for suits by Indian tribes.[12]

Moreover, it is entirely possible that Congress understood that state courts would be open to entertain suits by Indian tribes. As Felix Frankfurter has noted, claims arising under the Constitution, laws and treaties of the United States were litigated, "in the first instance [in] state courts, reserving, however, through the famous twenty-fifth section of the First Judiciary Act, review by the Supreme Court when a state court had denied a claim of federal right." F. Frankfurter, "Distribution of Judicial Power Between the United States and State Courts," 13 *Cornell L. Q.* 449, 507 (1928). Under federal supremacy principles, state courts were obligated to apply and enforce federal law when federal claims were presented. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 340 (1816). Thus, state courts were available to hear suits by tribes to enforce federal rights, including rights under the 1793 Act. *See, e.g., Coleman* v. *Doe*, 12 Miss. 40 (1844) (an Indian whose title to a section of land has vested by reason of the Dancing Rabbit Creek Treaty may bring an ejectment action and recover possession). Congress surely must have been aware of this fact when it enacted the Trade and Intercourse Acts.[13]

Nor is it likely that Congress thought Indians and Indian tribes lacked legal capacity to sue to enforce their

[12] Even after *Cherokee Nation*, federal courts continued to regard Indian tribes as "alien nations," if not strictly foreign. *See* Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[13] The Court later specifically confirmed that state courts were available to hear claims based on federally protected Indian land rights. Henderson v. Tennessee, 10 How. 311, 323-324 (1850). Numerous examples of state courts adjudicating controversies involving Indian rights under federal law can be cited. *See, e.g.*, Fellows v. Blacksmith, 19 How. 366 (1856); New York ex rel. Cutler v. Dibble, 21 How. 366 (1858). As there had been no change in the relevant law, these decisions confirm and reflect the state of the law in 1790 and 1793.

rights.[14] While occasionally suits were specifically authorized by statute, *see, e.g. Penobscot Tribe of Indians* v. *Veazie*, 48 Maine 402 (1870), the prevailing view was that Indian nations and tribes had capacity to sue without specific authorization. As early as 1810, state courts recognized the legal capacity of tribes: "The [Indian] nation, by its chiefs in council, is to be presumed competent to judge of its rights, and to preserve them, and private purchases from the nation or tribe are declared void upon other grounds." *Johnson ex. dem. Gilbert* v. *Wood*, 7 Johns. 290 (N.Y. Sup. Ct. 1810). Likewise, in *St. Regis Indians* v. *Drum*, 19 Johns. 127 (N.Y. Sup. Ct. 1821), the court decided a suit brought by an Indian tribe involving a lease of land from the tribe to a non-Indian without questioning the capacity of the tribe to sue. *See also Blair* v. *Pathkiller's Lessee*, 10 Tenn. 361 (1830) (Cherokee Indian "has clearly a right to sue and recover" lands granted under a treaty); *Swartzel* v. *Rogers*, 3 Kan. 374, 377 (1865) (in partition action under state law, "if the subject matter be within [the court's] jurisdiction, the parties, whether Indians or white men, have the right to litigate about it therein").

[14] The Trade and Intercourse Acts were enacted in a legal climate in which the capacity of tribes to sue had long been recognized. Suits by tribes and individual Indians were not uncommon during the colonial period. In 1703, for example, the Mohegan Indians sued the colony in Connecticut in Crown tribunals over a fraudulent land cession. The case demonstrated that "the plaintiff tribe was recognized to possess the attributes of internal sovereignty sufficient at least to maintain and prosecute an action." J. Smith, *Appeals From The Privy Council From The American Plantations*, 418 (1950). In 1705, the chief of the Wappinger Indians of eastern New York sued on behalf of his tribe to recover tribal lands. Although the tribe lost the case on the merits, no question was raised regarding capacity to sue. O. Handlin and L. Mark, eds., "Chief Daniel Nimham v. Roger Morris, Beverly Robinson, and Philip Philipse—An Indian Land Case in Colonial New York, 1765-1767," 11 *Ethnohistory* 193 (1964). In 1739, the Housatonnuc Indians were granted an ejectment remedy by the Inferior Court of Common Pleas in Massachusetts against a non-Indian. Y. Kawashima, "Indian Reservations in Massachusetts," 13 *Am. J. L. Hist.* 46 (1969).

While there are apparently no federal cases during this early period specifically addressing the capacity of tribes to sue, the Court very early implicitly recognized such capacity by affirming the legal and political existence of tribes independent of statutory recognition. *See Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832).[15]

In view of this contemporary and subsequent legal context, it cannot be said that Congress in 1793 believed that tribes lacked capacity to sue. The absence of reported suits to enforce violations of the 1793 Act was probably due not to any legal disability, but rather to enormous practical and cultural barriers. *See* R. Clinton and M. Hotopp, "Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims," 31 *Me. L. Rev.* 17, 46 (1979). The Counties and the State cite no contemporaneous judicial decisions nor any historical evidence which might suggest that Congress believed Indian tribes lacked capacity to sue.[16] Such an assumption is unsupportable.

B. The Identity of the Class for Whose Particular Benefit the Statute was Passed

The second question is whether the Trade and Intercourse Act of 1973 was enacted for the "special benefit"

[15] More explicit recognition of this capacity came later. *See* United States v. Crawford, 47 F. 861, 871 (C.C. W.D. Ark. 1891) (Creek Nation could sue for money received for its use and benefit); United States v. Boyd, 68 F. 577, 581 (C.C. W.D. N.C. 1895) (noting that Eastern Band of Cherokee Indians have sued in their own name at least since 1875); T-to-tah-Wah v. Babcock, 105 F. 257, 259 (C.C. N.D. Iowa 1900) (in all cases involving federal questions, Indians have always been recognized as proper suitors before federal courts); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

[16] The assertions of the dicta in *Joseph* v. United States, 27 Ct. Cl. 278, 285 (1892), so heavily relied on by the Counties, has been seriously questioned. *See* F. Cohen, *Handbook of Federal Indian Law*, 380, n. 169 (1942). Cherokee Nation v. Georgia, 5 Wheat. 1 (1831), did not declare a general incapacity to sue, but rather was based on the Court's understanding of the Framers' intent in adopting Article III of the Constitution.

of Indian tribes. *Cort* v. *Ash*, 422 U.S. at 78. "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California* v. *Sierra Club*, 451 U.S. at 294. This question is to be answered "by looking to the language of the statute itself." *Cannon* v. *University of Chicago*, 441 U.S. at 689.

The language of the Act plainly shows that Indian tribes are the intended beneficiaries of the land protection provisions. Section 8 provides: "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution. . . ." This language reveals an unequivocal intention to confer on Indian tribes special rights against unauthorized land conveyances.

A major purpose of the Trade and Intercourse Acts was to protect and guarantee Indian lands. The idea for a statute regulating Indian land transactions originated with President Washington and his Secretary of War, Henry Knox. F. Prucha, *American Indian Policy in the Formative Years*, 43-44 (1962). On July 7, 1789, Knox recommended that a law should be enacted recognizing that "Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not to be divested thereof, but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation, of the United States." *Ameri-*

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[17] That same year, Congress expressed its intent to safeguard Indian rights by enacting a statute relating to the Northwest territories, declaring in Article 3:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for

can State Papers, I *Indian Affairs*, 53 (1832). In explaining the newly enacted Trade and Intercourse Act, government agents strongly emphasized the protective purposes of its provisions.[18]

The Court confirmed this interpretation of the Act in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979), saying: "a major purpose of these acts as they developed was to protect the rights of Indians to their property."

> preventing wrongs being done to them, and for preserving peace and friendship with them.

Act of August 7, 1789, 1 Stat. 50.

[18] As Timothy Pickering explained to the Seneca Nation in November 1790:

> [The land alienation provision] is intended for the mutual advantage of the United States and of Indian tribes. In the past, some white men have deceived the Indians, falsely pretending they had authority to lease or purchase their lands: And sometimes they have seized on more lands than the Indians meant to sell them; again falsely pretending that those lands were comprehended within their purchase.

61 *Pickering Papers* 78A (Massachusetts Historical Society, microfilm edition)

A short time later President Washington reiterated to the Senecas the primary purpose of the new law:

> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. *The General Government will never consent to your being defrauded, but it will protect you and all your rights.* . . . But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in the future, you cannot be defrauded of your lands; [T]he United States must be present, by the agent, and will be your security that you shall not be defrauded in the bargain you may make. . . . That, besides the before mentioned security for your lands, you will perceive, *by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.* . . . (emphasis added).

American State Papers, I *Indian Affairs*, 142 (1832).

See also Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

The fact that the Trade and Intercourse Acts were enacted for the special benefit of Indian tribes is entitled to considerable weight in discerning congressional intent. "[T]he right or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Cannon* v. *University of Chicago*, 441 U.S. at 690, n.13.

The Counties argue that § 8 is solely a criminal provision which Congress could not have intended to be enforced through civil suits. Brief of Counties at 14. The presence of criminal penalties, however, does not negate the fact that section 8 imposes a severe civil sanction for violations of that section: namely that no acquisition of Indian land without the authority and the approval of the United States "shall be of any validity in law or equity. . . ." Because this provision regulates rather than prohibits the acquisition of Indian lands, it is not properly construed as a purely criminal statute. *See Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

In construing a statutory provision strikingly similar to § 8, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), the Court held that a right of action is properly inferred from the terms of the statute itself. In that case, § 215 of the Investment Advisers Act of 1940 provided that contracts whose formation or performance would violate the Act "shall be void . . . as regards the rights of" any person violating the Act or his successors in interest. 444 U.S. at 16-17. The Court held a private right of action was available because "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." 444 U.S. at 18. The Court thus concluded that "when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of

voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." 444 U.S. at 19. The same reasoning applies to the statute here.[19]

C. Legislative History

The legislative history of the Act also supports the finding that Congress intended there to be a cause of action to enforce § 8. As the Court of Appeals observed, the legislative history of the Act is "sparse and incomplete." 719 F.2d at 533. The absence of definitive legislative history, however, is not surprising since "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon* v. *University of Chicago*, 441 U.S. at 694.

The Counties emphasize the fact that there was no discussion of the question of whether Indians could sue to enforce the Act in the recorded legislative debate. Brief of Counties at 18-19. The absence of explicit consideration, of course, is not dispositive, as the Court has noted: "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on

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[19] A damages remedy for trespass to land is one of the "customary legal incidents" which follow from a statutory provision which voids agreements conveying land. *See* Bunch v. Cole, 263 U.S. 250 (1923).

The fact that the Court in *Transamerica* awarded only equitable remedies of rescission and restitution is not a tenable basis on which to distinguish it, as the Counties claim. Counties Brief at 14. The claim for damages there was based on § 206, not on § 215 which declared the voidness of contracts in violation of the Act. The Court held that § 206 could not provide the basis for a private right of action because it did not "in terms create or alter any civil liabilities," 444 U.S. at 19, and because of overwhelming evidence that Congress did not intend § 206 to be enforced through private damage suits. 444 U.S. at 20-22. Equally noteworthy is the fact that relief was limited to equitable remedies under § 215 because jurisdiction was expressly limited to "suits in equity." 444 U.S. at 19, n. 9.

its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18. Here, the absence of any discussion is explained by the fact that Congress in all likelihood assumed that Indian tribes would be permitted to sue to enforce the Act under the prevailing common law approach to statutory rights of action. *See* text above at 17.

Congress' intention to permit tribes to enforce the Act is plainly evident from the circumstances surrounding the enactment of the 1793 Act and subsequent acts. The genesis of the Trade and Intercourse Acts was the need to stabilize the deteriorating relations between Indian tribes and settlers on the frontier. Peace on the frontier was endangered by settlers seizing or acquiring lands in violation of treaty guarantees. F. Prucha, *American Indian Policy in the Formative Years*, 44-45.

To remedy the situation, Secretary of War Knox recommended that the rights of Indian tribes in their lands should be specially protected by the United States against alienation to anyone but the United States. This policy became the centerpiece of the Trade and Intercourse Act of 1790.

Soon after its passage, the Act was explained to Indian tribes by government officials. These speeches show unequivocally that President Washington, Secretary Knox and others understood that Congress intended Indian nations to have a right to sue in federal court under the Act to protect their lands. In response to complaints by the Seneca Nation about land matters, President Washington stated in early 1791 that these grievances were covered by the new law and that the Senecas had the right to sue:

> Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d of October, 1784, excepting such parts as you may have since fairly sold, to persons properly authorized to purchase of you.
>
> You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you has been declared null and void, so you may rest easy on that account. But it does not appear, from any proofs yet in possession of the Government, that Oliver Phelps has defrauded you.
>
> *If, however, you have any just cause of complaint against him, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.* (emphasis added)

American State Papers, I *Indian Affairs*, 139 (1832).[28]

Despite the legal guarantees in the 1790 Act, it proved to be largely ineffective in eliminating the causes of con-

[28] Washington's speech was printed, communicated to Congress along with other documents on January 11, 1792, and signed by Washington, countersigned by Secretary of State Thomas Jefferson and Henry Knox "by the command of the President of the United States." *American State Papers*, I *Indian Affairs*, 142-143 (1832). The speech was also communicated widely to Indian tribes. *See* 60 *Pickering Papers* 78-80 (Massachusetts Historical Society, microfilm edition). Timothy Pickering provided copies of the speech to representatives of the Six Nations Confederacy in July, 1791 at Newton Point, New York.

The evidence that President Washington and other high governmental officials understood that the Trade and Intercourse Act could be enforced in suits by Indian nations and tribes is entitled to considerable weight. *See* Cannon v. University of Chicago, 441 U.S. at 701-703. In *Cannon*, the Court relied in part upon the understanding or interpretation of the statute by the Executive Branch to support the inference of a private right of action under §901(a) of Title IX of the Education Amendments of 1972. The failure of Congress to disavow this understanding is evidence that Congress "at least acquiesces in, and apparently affirms, that assumption." *Id.* at 703.

flict between Indians and whites. F. Prucha, *American Indian Policy in the Formative Years*, 46 (1962). President Washington accordingly proposed new measures which he hoped would establish the rule of law in Indian land transactions and obviate the need to resort to force to enforce treaty guarantees. *Id.* These proposals were embodied in the Act of 1790. The new statute made violation of the land sales provision a criminal offense and authorized the President "to take such measures, as he may judge necessary, to remove" persons unlawfully settling on Indian lands. § 5. Thus, as the Court of Appeals observed, these new measures show a congressional intent "to provide maximum protection of Indian land. . . ." 719 F.2d at 534 (J.A. at 224a).

Further evidence that Congress intended the Trade and Intercourse Act to be enforced through civil suits by tribes is found in an 1822 amendment to the Act. This amendment provided:

> In all trials about the right of property in which Indians shall be a party on one side, and white persons on the other, the burden of proof shall rest upon the white person in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Act of May 6, 1822; 3 Stat. 683; 25 U.S.C. § 194. This statute has been held to apply to Indian tribes. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653 at 665-666 (1979). This section presupposes that a private right of action would be available to Indian tribes. Congress could not plausibly have intended to limit this provision to suits in which tribes were defendants since the sovereign immunity of tribes would have foreclosed that possibility. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The more plausible construction of this provision is that Congress contemplated that tribes would be able to enforce the Act in court. Any other interpretation would render the provision substantially meaningless.

D. Statutory Purpose

The fourth factor in determining congressional intent is the issue of whether a private right of action is consistent with the underlying purpose of the statute. *California v. Sierra Club*, 451 U.S. at 293. In *Cannon v. University of Chicago*, the Court noted: "[a] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 441 U.S. at 703.

That the Act was intended to benefit Indians has already been demonstrated. The more specific purpose was to protect Indian land against unauthorized conveyance in order "[t]o prevent the steady eating away at the Indian Country by individuals who privately acquired lands from Indians. . . ." F. Prucha, *American Indian Policy in the Formative Years*, 44 (1962). As this Court has observed, the "obvious purpose of that statute is to prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties except the United States, without the consent of Congress." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). *See also Wilson v. Omaha Indian Tribe*, 442 U.S. 653-664 (1979).[29]

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[29] Every court which has addressed the issue has concluded that the Acts were intended to protect Indian land against unauthorized transfers. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Congress' concern in the 1790 Act was "with providing effective protection for the Indians 'from the violence of the lawless part of our frontier inhabitants.'" quoting Seventh Annual Address of President Washington); Mohegan Tribe v. Connecticut, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers was one object of the Act's land provisions); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 697 (9th Cir. 1976) (Act intended to prevent steady diminution of Indian territory unless by public treaty); Joint Tribal Council

The inference of a right of action in favor of Indian nations or tribes is necessary and helpful to the accomplishment of this statutory purpose. The express remedies provided in the Act, particularly the removal of intruders provision and the criminal penalties for unauthorized negotiations, were largely ineffective in protecting Indian land against unlawful acquisition. The leading scholar on the Trade and Intercourse Acts has concluded that ". . . the great illegal onrush of settlers onto the Indian lands . . . was usually so great that the United States was unable to enforce the intercourse acts with any complete success." F. Prucha, *American Indian Policy in the Formative Years*, 147 (1962). In particular, "[t]he procedure of moving the illegal settlers off became almost a game and was never completely effective." *Id.* at 163. Thus, if the Act were unenforceable by Indians, the purpose of the Act would be largely frustrated.[29] An implied right of action is not only consistent with the Act's purpose but necessary to make the guarantees of the Act effective.

Relying on *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the Counties argue that the purpose of the Act was to maintain peace on the frontier and that, even if an incidental purpose was to protect Indians, that purpose is not served by the finding of an implied right of action. Brief of Counties at 22. Although the maintenance of peace may have been one goal of the Act, as the circuit court in *Mohegan Tribe* concluded: ". . . there is no evidence

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of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975); Cayuga Indian Nation of New York v. Cuomo, 565 F.Supp. 1297, 1323-1324 (N.D. N.Y. 1983); Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F.Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe v. Southern Rhode Island Development Corp., 418 F.Supp. 798, 803 (D. R.I. 1976).

[29] The right of Indian tribes to enforce the Act is particularly important since the decision of the United States to sue on their behalf is a discretionary one. *See* Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1062 (9th Cir. 1972).

demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts." *Id.* at 622 (emphasis in original). Moreover, the overwhelming evidence that the express remedies were ineffective undermines the argument that inferring a private right of action would disserve the purposes of the Act because it may dilute the enforcement process.

E. Federal Role in Enforcing Indian Land Rights: Absence of State Role

Inference of a private right of action is particularly appropriate here, because the protection of Indian land rights has traditionally been the exclusive concern of federal law. Inference of a right of action thus does not interfere with an area traditionally governed by state law. *See Daily Income Fund, Inc.* v. *Fox*, —— U.S. ——, 104 S. Ct. 831, 842 (1984). As the Court in its 1974 decision in this case held: "Once the United States was organized and the Constitution adopted, the tribal rights to Indian lands became the exclusive province of the federal law." *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. at 667 (1974). The Court described as "rudimentary propositions" the principles that Indian land rights are a matter of federal law and can be extinguished only with federal consent. *Id.* at 670.

F. Adequacy of Express Remedies to Serve the Legislative Purpose

The Counties argue that Congress could not have intended the Act to be enforced by Indian tribes because the remedies it provided were intended to be exclusive and, in fact, were adequate to fulfill the congressional purpose. Brief of Counties at 16, 17, 23. The historical evidence shows, on the contrary, that the express remedies provided by the Trade and Intercourse Acts were entirely ineffective. *See* F. Prucha, *American Indian Policy in the Formative Years*, 147, 163 (1962). The only remedies concerning land are a light criminal penalty for negotiating or attempting to negotiate a treaty without

the authority of the United States (§ 8), a criminal penalty for unlawfully settling on Indian land (§ 5) and a provision authorizing the President to remove settlers (§ 5). Section 12 provided that "informants" could collect half of the fines imposed unless the United States instituted the prosecution. In view of these meager remedies, it is entirely unreasonable to impute to Congress an intent to preclude other remedies.

This Court rejected similar arguments in *Cannon* v. *University of Chicago*, 441 U.S. at 711, where it is observed that ". . . the Court has generally avoided this type of 'excursion into extrapolation of legislative intent' unless there is other, more convincing evidence that Congress meant to exclude the remedy" (quoting *Cort* v. *Ash*, 422 U.S. at 83, n.14). As a general rule, "[t]he creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies." *California* v. *Sierra Club*, 451 U.S. at 296, n.6.

The Counties offer no compelling reason to depart from the general rule. No legislative history or other evidence is cited to support the assumption that Congress meant these few remedies to be exclusive. By contrast, there *is* evidence that the Executive and Congress intended the Act to be enforced by Indian tribes and that the express remedies were inadequate. In *Cannon* v. *University of Chicago*, 441 U.S. at 708, the Court decided that a private right of action should be inferred because the statutory remedy was not adequate to provide effective protection.

No intent to exclude civil suits is shown in the structure of the legislative scheme.[32] Two consequences flow

[32] *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) does not compel a different conclusion. The enforcement mechanisms there were far more detailed and elaborate than those provided in the 1793 Act. The enforcement mechanisms included suits by the Administrator of the Environmental Protection Agency for compliance orders and civil penalties

from a violation of § 8 of the 1793 Act. The person or state negotiating the treaty with the Indian nation without authority from the United States is subject to a $1,000 fine and possible imprisonment. *United States* v. *Hunter*, 21 F. 615 (C.C. E.D. Mo. 1884). The more important consequence is that the land conveyance is declared to be "of no validity in law or equity." It is this civil sanction for which enforcement is sought by the Oneidas. To preclude Indian suits would practically nullify one of the legal consequences Congress provided in § 8.

In similar contexts, the Court and lower federal courts have refused to interpret express statutory remedies as exclusive of all other remedies. In *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922), an Indian sued to cancel a deed conveying his allotment to a special assistant to the U.S. Attorney General on the ground that the conveyance violated a federal statute. The statute expressly provided a fine of $5,000 and removal from office as penalties for its violation. The Court held the conveyance void, and remanded for an accounting. 259 U.S. at 138. There was no suggestion that the criminal penalties barred other remedies which could be inferred from the terms of the statute.[33]

of up to $10,000 per day, suits by "any interested person" seeking judicial review of actions of the Administrator and suits by private persons for injunctions to enforce the statutes. 453 U.S. at 13-14. By contrast, the 1793 Act contained no express citizen suit provision, nor did it provide the government with such elaborate enforcement powers.

[33] *See also* United States v. Brogher, 24 Fed. Cas. 1295 (C.C.D. Ohio 1854), in which an informer suit provision in a federal statute regulating licensing of steamboat operators was found not to be the exclusive remedy because otherwise the enforcement of the statute would be "wholly inefficient"; Chin v. Darnell, 5 Fed. Cas. 654 (C.C.D. Ohio 1848) in which ejectment was granted where a conveyance of land was in violation of the Proclamation of Congress of 1783 and the Trade and Intercourse Acts.

IV. THE ONEIDAS' RIGHT OF ACTION HAS NOT ABATED

The Counties argue that all causes of action arising under the 1793 Act have abated because that Act was repealed by the Trade and Intercourse Act of 1796. *Brief of Counties* at 35-38. The Court of Appeals, relying on the fact that the pertinent provision of the 1793 Act "remains operative," properly rejected this argument. 791 F.2d at 337 (J.A. at 231a).

The common law rule of abatement is inapplicable. Principally a doctrine of criminal procedure, the rule provides that the repeal or expiration of a statute abated all prosecutions under it which have not proceeded to final judgment, unless the repealer expressly provides for the continuation of such prosecutions. *See Warden v. Marrero*, 417 U.S. 653 (1974). Here, however, there has been no repeal or expiration of § 8 of the 1793 Act. The statutory provision invalidating unauthorized Indian land conveyances has been in continuous force since 1790 with only minor changes.[29] Under these circumstances the abatement rule does not apply.

When a statute is "in terms repealed and simultaneously reenacted with changes, the amendatory or reenacting act becomes a substitute for the original . . . .[T]he better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption." *Great Northern Ry. Co. v. United States*, 155 F. 945, 948 (8th Cir. 1907), *aff'd*, 208 U.S. 452 (1908). This principle has been recognized by the Court. *See Steamship Co. v. Joliffe*, 2 Wall. 450, 458 (1864); *Bear Lake Irrigation Co. v. Garland*, 164 U.S. 1, 11-13 (1896).[30] Thus, the Oneidas' right of action is not affected by the fact that the 1793 Act was a temporary statute and was repealed by the 1796 Act.

The Counties further suggest that § 8 of the 1793 Act merely prevented enforcement of conveyances which violated the Act and that, as a result, those conveyances became enforceable after the repeal of the 1793 Act. *Brief of Counties* at 38. This reading of the Act is totally inconsistent not only with the language of § 8, but also with the intent of Congress to nullify absolutely all conveyances of Indian land except those specifically authorized and approved by the United States. To carry out this intent, the words "of no validity in law or equity" must be understood to mean such conveyances are void unless authorized by the United States. *See United*

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[29] Between 1793 and 1834, Congress enacted six trade and intercourse acts, each containing a land sales provision identical in substance to § 8 of the 1793 Act. Act of July 22, 1790, 1 Stat. 137 (§ 4); Act of March 1, 1793, 1 Stat. 329 (§ 8); Act of May 19, 1796, 1 Stat. 469 (§ 12); Act of March 3, 1799, 1 Stat. 743 (§ 12); Act of March 3, 1802, 2 Stat. 139 (§ 12); Act of June 30, 1834, 4 Stat. 729 (§ 12). The first four acts were temporary in nature with fixed dates for expiration. In each case, however, a new act was passed before the previous act expired. *See* F. Prucha, *American Indian Policy in the Formative Years*, 63-69 (1962). The Act of 1802, the first permanent act, was replaced by a new act in 1834 which also contained the land alienation provision and provided that the repeal of the 1802 Act "shall not affect [affect] any rights acquired, or punishments, penalties or forfeitures incurred" under that Act. 4 Stat. 729, 734, 829. The pertinent provision of the 1834 Act is now codified at 25 U.S.C. § 177.

[30] *Great Northern Ry. Co.* cannot be distinguished as the Counties suggest. The principle of statutory construction affirmed in that case did not depend in any way on the fact that the successor act repealed only those statutes in conflict with that act, nor did it depend on the abrogation of the common law abatement doctrine in 1871. Similarly, *Steamship Co. v. Joliffe* is not so easily dismissed. The decision there did not turn on the nature of the right acquired, but rather on Congress' intent to continue in force substantially all of the provisions of the original act. 69 U.S. at 458.

The authorities cited by the Counties do not support their abatement argument. *Norris v. Crocker*, 13 How. 429 (1851), principally relied on by the Counties, is readily distinguishable. *Norris* involved an action of debt, specifically authorized by the statute, to recover a penalty of $500 under a criminal statute which penalized interference with the recovery of a fugitive slave. The statute there was not reenacted nor were the operative provisions continued in force in the new act.

States v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). It would be absurd to read the language to mean that such conveyances were void while the Act was in effect but became enforceable when the 1796 Act—evidencing an identical intention to prohibit unauthorized Indian land transactions—was enacted. As the Court has observed, "[n]o title can be held valid which has been acquired against law . . . ." *Stoddard* v. *Chambers*, 2 How. 284, 317 (1844).

V. THIS ACTION IS NOT BARRED BY ANY STATE OR FEDERAL STATUTE OF LIMITATIONS

The Court of Appeals correctly held that New York's statute of limitations does not bar this suit. State statutes of limitations and other state law delay-based defenses have uniformly been held inapplicable to suits to enforce Indian land rights. *See Ewert* v. *Bluejacket*, 259 U.S. 129 (1922); *United States* v. *Akhtenam Irrigation District*, 236 F.2d 321, 324 (9th Cir. 1956). In *United States* v. *Forness*, 125 F.2d 928, 932 (2d Cir. 1942), *cert. denied sub nom. City of Salamanca* v. *United States*, 316 U.S. 694 (1942), the court held that, because Indian land rights are exclusively the subject of federal law, state law cannot be invoked to limit the rights of Indians to their lands. Similarly, in *Catawba Indian Tribe of South Carolina* v. *South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983), the court held that the Trade and Intercourse Act and the Supremacy Clause preempt the application of state statutes of limitation to Indian land claims.

Recognizing the overwhelming weight of the authority against the applicability of state statutes of limitations, the Counties and the State assert that New York's statute of limitations should be borrowed and applied as a matter of federal law. The Court of Appeals' rejection of this argument is supported by sound reasons of law and policy.

The Trade and Intercourse Act does not contain a limitations period, nor does any other federal statute ex-

pressly provide a limitations period applicable to this suit. "But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977). In particular, "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 367; *see also Del-Costello* v. *International Brotherhood of Teamsters*, —— U.S. ——, 103 S. Ct. 1421 (1983), noting that state statutes of limitations are unsatisfactory vehicles for the enforcement of federal law when they are at odds with the purpose or operation of federal substantive law.

As the Court of Appeals recognized, the adoption of a New York statute of limitations is plainly inconsistent with the federal policies embodied in the Trade and Intercourse Act. That policy is to guarantee Indian land rights by preventing "unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress." *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). The application of a state statute of limitations would significantly undermine this policy of federal protection, as the Court of Appeals recognized, by permitting a violation of the Act to continue unremedied. 791 F.2d at 538. (J.A. at 232a).[17]

The borrowing of state law here would also frustrate the strong federal policy of maintaining uniform national rules governing disposition of Indian land. As this

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[17] The Counties' argument that subjecting Indian claims to state statutes of limitations would not be inconsistent with the policy of the Act because the United States could sue on the tribe's behalf ignores the fact that such a suit would be entirely discretionary. *See* Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082 (9th Cir. 1972). Thus, the Court of Appeals' concern about violations of the Act going unremedied is entirely justified. In fact, the United States declined to prosecute this action on behalf of the Oneidas.

Court recognized in 1974, Indian rights to land are "the exclusive province of the federal law" and are extinguishable "only by the United States." *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. at 667. If Indian tribes are subject to varying limitations periods, depending on the location of the land, this policy of federal supremacy and uniformity would be defeated.

In *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), the Court approved the adoption of state substantive law where "there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests." 442 U.S. at 673. Here, on the contrary, adoption of state law would effectively destroy Indian property rights.

The rationale of *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922) also precludes the adoption of state statutes of limitations. There, the Court refused to apply rules of limitation which would "give vitality to a void deed" and bar the rights of Indians in lands subject to statutory restraints on alienation. 259 U.S. at 138. Because application of New York's statute of limitations would similarly give vitality to a conveyance which is declared void by federal law, that statute cannot be borrowed.

The Court of Appeals also reasoned that borrowing state law would be inconsistent with the federal interest in treating Indian tribes as favorably as the United States, which would not be subject to state statutes of limitations in these circumstances.[28] *See United States*

[28] The Counties and the State argue that disparity of treatment between the United States and Indian tribes would be justified in this regard because of the so-called guardian-ward relationship. Brief of Counties at 33-34; Brief of State at 31-32. The Court has held, however, that the scope and nature of the respective powers under the so-called guardian-ward or trust relationship are defined solely by statute, treaty or perhaps executive order. United States v. Mitchell, 445 U.S. 535 (1979). Neither the Counties nor the State has identified any statute, treaty nor executive order which requires the disparate treatment for which they argue.

v. *Minnesota*, 270 U.S. 181, 196 (1926). *United States* v. *Minnesota* does not justify different rules of limitation for tribes and the United States when tribes sue to enforce their land rights. In that case, the fact that the United States could sue and the tribe could not was not the result of the statue of the tribe. Rather, the tribe could not sue because of the State's immunity from suit. 270 U.S. at 195. Today, even that bar to the assertion of Indian rights by the tribe would not exist. *See Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070, 1080 (2d Cir. 1982).

The Court of Appeals also looked to 28 U.S.C. § 2415 for guidance in determining whether to borrow state statutes of limitations. This Court need not decide whether § 2415 applies to actions brought by tribes themselves since even if it does apply, this action would not be barred. 791 F.2d at 538 (J.A. at 233a). The Court of Appeals' holding that at the very least this suit should be regarded as timely if a similar suit by the United States would be timely, is consistent with the legislative history of § 2415, which demonstrates a concern for the preservation of historic Indian trespass claims to land. *See Capitan Grande Band of Mission Indians* v. *Heliz Irrigation Dist.*, 514 F.2d 465, 469-70 (9th Cir. 1976), *cert. denied*, 423 U.S. 874 (1976).

Section § 2415 also precludes the adoption of state law as the federal rule of decision here because it is "an explicit legislative policy cutting across state interests." *Board of Commissioners* v. *United States*, 308 U.S. 343, 352 (1939); *Brooks* v. *Nez Perce County, Idaho*, 670 F.2d 835, 837-38 (9th Cir. 1982). Congress has determined a limitations period for damage suits by the United States on behalf of Indian tribes, and the Court of Appeals properly looked to that policy for guidance in determining that adoption of state law would be inconsistent with the federal interest in permitting tribes to sue on their own behalf.

The question of whether some other doctrine of limitations, such as laches, adverse possession or bona fide

purchaser for value, would bar this suit need not be reached by this Court. Although these defenses were raised by the Counties in the district court, they were abandoned on appeal and have not been urged or briefed here. In any event, the applicability of these defenses is foreclosed by prior decisions of the Court. As the Court held in *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922): ". . . the equitable doctrine of laches . . . cannot have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."

Because the District Court held that laches did not apply, it did not undertake the detailed factual inquiry necessary to determine whether the Oneidas unreasonably delayed in filing this suit. As a result, the factual record before the Court is inadequate for a fair determination of this issue. There are many factual issues not addressed by the District Court which would have a crucial bearing on the question of laches, such as the economic, cultural and social reasons why the suit was not filed earlier. Therefore, even if the doctrine of laches were found to apply, it would be necessary to remand this case for consideration of the factual and historical issues bearing on laches.

VI. THE 1795 CONVEYANCE IS NOT VALIDATED BY THE TREATIES OF 1796 AND 1802

The Counties and the State argue that the 1795 conveyance at issue here is valid because the United States implicitly ratified it in the federal treaties of 1796 and 1802. Brief of Counties at 39-44; Brief of State at 32-36. This argument is contrary to the longstanding principles adopted by the Court in *United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941), that any extinguishment of Indian land rights by Congress must be by "plain and unambiguous action," 314 U.S. at 346, and that extinguishment of Indian land rights will not be "lightly implied," 314 U.S. at 354. *See also Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). As the Court of Appeals in this case noted, this standard applies

to the alleged approval of the 1795 conveyance, since "ratification" would also extinguish the Oneidas' title to the subject land. 791 F.2d at 539. (J.A. at 236a).

Judged by this standard, neither the 1796 Treaty nor the 1802 Treaty[28] can be found to have approved or validated the 1795 conveyance. The 1796 Treaty refers to an earlier conveyance as "the last purchase from them." (J.A. at 36a). The 1802 Treaty merely refers to "other lands heretofore ceded" by the Oneida Nation (J.A. at 39a). In view of the circumstances of the making and approval of these treaties, neither of these cryptic references can be regarded as a "plain and unambiguous" approval of the 1795 conveyance. In neither treaty is there any explicit reference to the 1795 conveyance or its validity. There is no assurance that the federal commissioners who negotiated the treaties nor the Senate were even aware that the boundary lines referred to were those drawn by the 1795 conveyance.[29] Thus, there is no evidence that the relevant language in

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[28] It may be doubted whether the Treaty of 1802 was properly ratified and effective. It is the President's act of approval after the Senate gives its consent which constitutes ratification under the Constitution. Art. II, § 2, para. 2; L. Henkin, *Foreign Affairs and the Constitution*, 130 (1972); Reiff, "The Proclaiming of Treaties in the United States", 50 *Am. J. Int'l L.* 63, 66-69 (1956). For example, the Senate consented to the Creek Treaty of 1790 and thereafter advised the President "to ratify the same." 1 *Journal of the Executive Proceedings of the Senate* 61, 62 (1829 ed.). Although the Senate consented to the 1802 Oneida Treaty, there is no evidence that the President then ratified it. Significantly, two early compilations of laws and treaties fail to include the 1802 Treaty among the list of ratified treaties, while the 1794 Oneida Treaty is included in both. *See Bioren and Duane's Laws of the United States 1789-1815* (1815); *Message on Indian Land Titles*, House Document No. 74, 17th Congress, 1st Sess., 7-8 (February 20, 1822). Although the absence of any record of express presidential ratification may not be conclusive, it raises a substantial doubt whether the treaty ever became effective and whether the United States intended to validate the 1795 conveyance in the 1802 Treaty.

[29] Neither the Counties nor the State suggest that the Senate was shown maps or other evidence that would indicate awareness of the 1795 transaction.

both treaties is anything more than a reference to previously drawn boundary lines inserted for the purpose of identifying the lands ceded in each treaty.

Neither the Counties nor the State cite any historical or other evidence which would suggest that the United States intended by these passing references to boundary lines to approve the 1795 conveyance. There is nothing in the reports of the federal commissioners which supports such an intent. *American State Papers*, 1 *Indian Affairs*, 641-643, 663-665 (1832) (Commissioner Joseph Hopkinson reporting to Secretary of State on June 26, 1795); (Commissioner John Taylor reporting to Secretary of War on July 19, 1802).

The single purpose of both treaties was to acquire the specific lands described therein. *See* 1 *Journal of the Executive Proceedings of the Senate*, 273 (1828 ed.). (President Adams on May 3, 1796, appointing Hopkinson to be the federal commissioner for the purpose of holding a treaty with the Oneidas so they may "sell a part of their land" to New York); *Id.* at 408 (appointing Taylor on March 10, 1802, to negotiate with the Oneidas "for the purchase of lands in, and for the State of New York, which they are willing to sell"). Not only is there no evidence that Congress intended to validate the 1795 transaction, but on the contrary, Congress repeatedly expressed its intention both before and after the 1795 and 1802 treaties that any conveyance of Indian land be by treaty entered into as specified in the Trade and Intercourse Acts. The Court of Appeals thus correctly held that the 1795 conveyance was not subsequently approved, either implicitly or explicitly.[30]

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[30] The facts that the State of New York has exercised jurisdiction over the land conveyed by the 1795 transaction and that the United States does not regard the area as Indian country are irrelevant. The Court has held that subsequent treatment of an area by other governments is relevant only when the question is whether the tribe retains jurisdiction in the face of congressional action diminishing the reservation boundaries. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1976). It cannot affect the

The authorities relied on by the Counties and the State do not authorize validation of the 1795 conveyance by implicit ratification.[30] *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) does not sanction implied ratification as a lawful means of extinguishing Indian title. That case did not hold, as the Counties suggest, that the consent of Congress under the Trade and Intercourse Act could be "inferred" from the general terms of the Federal Power Act. It held that the Trade and Intercourse Act's requirement of federal consent did not apply to a taking by the United States under the Federal Power Act. 362 U.S. at 120. Thus, that case is not relevant to the question of the type of consent which will satisfy the requirement of the Trade and Intercourse Act.

United States v. National Gypsum Co., 141 F.2d 810 (2d Cir. 1944), likewise involved the applicability of the land alienation provision of the Trade and Intercourse Act. 25 U.S.C. § 177. The court there held that the transfer of land of the Tonawanda Band of the Seneca Nation "in trust" to the State of New York under the Treaty of 1857 empowered the State to authorize the leasing of that land without the consent of the United States. 141 F.2d at 861, 863. The "understanding" of United States and State officials was relevant only as an aid in construing the scope of the State's powers.

Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965), relied solely on *National Gypsum Co.* as authority for the proposition that implicit ratification may constitute congressional approval under 25 U.S.C. § 177.

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lawfulness or validity of Indian land conveyances. Indian title can be extinguished only by "plain and unambiguous" congressional action. United States v. Santa Fe Pacific Ry. Co., 314 U.S. 339 (1941).

[30] Shoshone Tribe v. United States, 299 U.S. 476 (1937), did not establish the legitimacy of implicit ratification of unlawful Indian land alienation. The fact that the title of the Shoshones had been extinguished had been conceded by all parties and the only issue before the Court was the date of extinguishment. 299 U.S. at 492. Thus, *Shoshone Tribe* is not relevant to the issue presented here.

its value as precedent, therefore, is highly questionable. Moreover, the finding of implicit ratification in the 1927 Act which acknowledged New York's ownership of the land in question was supportable primarily because the Seneca Nation had not alleged that the takings by the State were "in any respect inequitable." 173 Ct. Cl. at 916. By contrast, the Oneidas allege that the State fraudulently induced them to enter into the 1795 transaction and the Court of Appeals found that the transaction was "fraught with irregularities." 719 F.2d at 529. (J.A. at 212a).

VII. THE ONEIDAS' CLAIM DOES NOT PRESENT A POLITICAL QUESTION

The Counties and the State, in asserting that this case presents a nonjusticiable political question, attempt to pull a page from the jurisprudence of the Nineteenth Century, when any dispute over Indian lands was thought to raise a political question. *See* F. Cohen, *Handbook of Federal Indian Law*, 218 (1982 ed.). That view, long discredited, has now been "expressly laid to rest." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 413 (1980).[29]

The political question doctrine is limited to a very narrow range of cases. Political questions arise only when there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards," or overwhelming prudential considerations such as "an unusual need for unquestioning adherence to a political decision already made . . . ." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Indeed, since *Baker*, this Court has only once found a case nonjusticiable on political question grounds. *See Gilligan* v. *Morgan*, 413 U.S. 1 (1973).[30]

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[29] *Nor* is the mere invocation of the term "political" enough to render a case nonjusticiable. This Court has repeatedly emphasized that the presence of even "significant political overtones" cannot turn a case into a political question. Immigration and Naturalization Service v. Chadha, —— U.S. ——, 103 S. Ct. 2764, 2780 (1983).

[30] The *Gilligan* case presented a paradigm political question. There the Court found that each of the strands of the doctrine

As is demonstrated below, there has been no "constitutional commitment" of the Oneidas' claim to either Congress or the President. Neither has the Congress or the President made a decision demanding the Court's "unquestioning adherence."[31] At bottom, this case requires only that the Court interpret the Trade and Intercourse Act. "Such a determination falls within the traditional role accorded the courts to interpret the law . . . ." *Powell* v. *McCormack*, 395 U.S. 486, 548 (1969).

A. The Indian Commerce Clause Is Not A Textual Commitment To Congress

The Counties argue that the Court cannot decide this case because Congress has sole authority for resolving Indian disputes, which authority it has delegated to the President. This argument is premised on the unelaborated assertion that the Indian Commerce Clause, art. I, § 8, cl. 3, represents a "textual commitment" of exclusive authority over Indian affairs to Congress. *See* Brief of Counties at 46. This assertion, akin to arguing that the Commerce Clause deprives the federal courts of jurisdiction over cases involving interstate commerce, confuses a grant of power with a textual commitment of exclusive authority. The fact that Congress possesses some power over Indian affairs cannot mean that no other branch may act in the field. Such a principle, applicable to all congressional powers, would effectively destroy the role of the federal judiciary.

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would be violated if the courts were to review and supervise the training, orders, and weaponry of the Ohio National Guard. 413 U.S. at 5-6. By contrast, the Court has consistently rejected other political challenges since *Baker*. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); United States v. Nixon, 418 U.S. 683 (1974); Elrod v. Burns, 427 U.S. 347 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); Immigration and Naturalization Service v. Chadha, —— U.S. ——, 103 S. Ct. 2764 (1983). *See also* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

[31] Petitioners apparently recognize that the Trade and Intercourse Act provides "judicially manageable standards."

A "textual commitment" to a single branch is distinguished from a mere grant of power by the purpose of the commitment. "The non-justiciability of a political question is primarily a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. at 210. True textual commitments serve to reinforce the separation of powers. *See Davis* v. *Passman*, 442 U.S. 228, 235, 236, n.11 (1979). For example, the Speech or Debate Clause is a paradigm textual commitment, *id.*; that clause directly limits Judicial and Executive interference in the legislative process. By contrast, the Indian Commerce Clause does not speak to the separation of powers at all. Its purpose was only to assert federal power as against the states. *See The Federalist, No. XLII* (Madison) (E.P. Dutton, ed., 1948) 215-16.

The Counties and the State maintain that the scope of Congress' authority under the Indian Commerce Clause is so broad as to preclude judicial construction and implementation of the Trade and Intercourse Act, a statute passed pursuant to that authority. Clearly, no one would assert that Congress' analogous power to regulate interstate commerce, arising under art. I, § 8, cl. 3, forecloses a judicial forum to those seeking to vindicate rights under statutes passed pursuant to that power. *See, e.g., Daniel* v. *Paul*, 395 U.S. 298 (1969). Similarly, it is patently unreasonable to argue that the Indian Commerce Clause commits to Congress such broad authority as to preclude judicial action in cases involving Indian land claims.

B. The Constitution Does Not Commit Authority Over Indian Land Claims To The President

Petitioners' argument that Indian affairs have been textually committed to Congress is merely a predicate for their assertion that the President possesses sole power to resolve Indian land claims. The political question doctrine would only be implicated if there were a "textually demonstrable *constitutional* commitment" to the President. *See Baker* v. *Carr*, 369 U.S. at 217 (emphasis added). Recognizing that there is no such constitutional

commitment to the President here, Petitioners suggest that a constitutional commitment to Congress and delegation to the President—by means of the Trade and Intercourse Act and the Treaty of Canandaigua—will do as well. This attempt to "bootstrap" a commitment to the President plainly fails; such an extension of the political question doctrine is wholly unwarranted.[20]

Even assuming *arguendo* that Congress does possess sole authority over Indian affairs and could delegate it, nothing in the Trade and Intercourse Act or the Treaty of Canandaigua commits *sole* remedial discretion to the President. *Cf. Luther* v. *Borden*, 7 How. 1 (1849). At most, Congress has given the President *some* power to act; the Trade and Intercourse Act, for example, provides that "it shall . . . be lawful for the President to take [remedial] measures . . . ." 1793 Act, § 5. This is hardly a compelling commitment of exclusive authority. Nowhere else is there any indication that Congress has delegated exclusive authority in this area to the President, and this argument must fail.

C. Prudential Considerations Do Not Suggest That This Case Involves A Political Question

In certain instances "prudential" considerations, such as the need for "unquestioning adherence" to a presidential decision, or a fear of embarrassment from "multifarious pronouncements" from different branches, counsel against judicial resolution of a controversy. *See, e.g., Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Failing to demonstrate that there has been a textual commitment to one of the political branches, Petitioners attempt to force

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[20] *Luther* v. *Borden*, 7 How. 1 (1849), apparently found commitment to the president through a delegation of congressional power. Needless to say, that case was decided more than a hundred years before the modern political question doctrine was articulated in *Baker* v. *Carr*, *supra*. Moreover, the Court in *Luther* was centrally concerned with the lack of judicially manageable standards for determining which was the lawful government of Rhode Island.

this case into the prudential considerations mold by appealing to issues not before the Court.

The Counties intimate that so-called "tribal governance" issues somehow render this case nonjusticiable. *Brief of Counties* at 47-48. However, those issues are simply not before this Court. As the Court of Appeals noted, the only question presented here is the liability of the Counties and the State, not the allocation of damages among the Oneidas. 719 F.2d at 539 (J.A. at 234a-235a).[47] Neither is this a case like *Luther* v. *Borden*, 7 How. 1 (1849), in which the resolution of the substantive claim depends on a judicial determination of sovereignty. The Counties' substantive liability under the Trade and Intercourse Act is unrelated to which group constitutes the proper tribal authority.

Undoubtedly, a political question may be involved when there is "an unusual need for unquestioning adherence to a political decision already made . . . ." *Baker* v. *Carr*, 369 U.S. at 217. Here, however, no such decision has been made. Sixteen years ago the Interior Department declined to bring an action on behalf of the Oneidas for the sole reason that the Oneidas had a claim pending before the Indian Claims Commission. *See* J.A. at 44a. This action did not constitute a political evaluation of the merits of such litigation nor a political decision that the consequences were too forbidding. The only apparent consideration was the conservation of governmental resources. Such a determination does not touch the concerns of the political question doctrine.[48]

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[47] Surprisingly, the Counties cite Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), for the proposition that the Court cannot "allocate[e] . . . tribal property." *Brief of Counties* at 48. In fact, that case specifically rejected the notion that the political question doctrine immunized the allocation of tribal property from equal protection review.

[48] Quite simply, the Interior Department did not find that the courts should not decide the Oneidas' claim, but only that Interior would not prosecute it. The Court is not asked here to review Interior's decision not to prosecute.

Even if the Executive had made a "political decision" on the issue presented here, there is no "unusual need" for "unquestioning adherence" to that decision. *See Baker* v. *Carr*, 369 U.S. at 217. It is in the field of foreign relations that questions may "uniquely demand single-voiced statements of the Government's views." *Id.* at 211.

This Court in recent years has consistently rejected political question attacks on the justiciability of Indian land cases. *See Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980); *cf. Baker* v. *Carr*, 369 U.S. at 215-16.[49] The lower courts have, without exception, followed suit with respect to Eastern Indian land claims.[50] As the Court noted earlier in this litigation, "federal law *and federal courts* must be deemed the controlling considerations in dealing with Indians." *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. at 670 (1974) (emphasis added).

Recognizing the weakness of their substantive political question arguments, the Counties rely largely on *predictions of disruption and chaos if this case is decided on the merits.* It is intimated that the Court should decline to tread where such possibilities loom, no matter

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[49] Although *Delaware Tribal Business Comm.* and *Sioux Nation* both involved constitutional attacks on congressional action, the Court has also decided suits requiring only treaty construction without finding a political question bar. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

[50] *See, e.g.*, Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070 (2d Cir. 1982); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F.Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975); Short v. United States, 661 F.2d 150 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1004 (1982); Cayuga Indian Community v. Watt, 551 F.Supp. 986 (D.D.C. 1982); Narragansett Tribe of Indians v. Southern Rhode Island Development Corp., 418 F.Supp. 798 (D.R.I. 1976).

how speculative. The Court has sufficiently answered such suggestions:

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment and conscientiously to perform our duty.

Immigration and Naturalization Service v. *Chadha*, —— U.S. ——, 103 S. Ct. at 2780, *quoting Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821). This the courts have done in a remarkable range of cases involving far more intractable and complex problems than the present litigation. *Cf. Reynolds* v. *Sims*, 377 U.S. 533 (1964) (reapportionment); *Arizona* v. *California*, 373 U.S. 546 (1963) (water rights); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (desegregation). In the end, the Counties are reduced to claiming that the injury to the Oneidas is too severe to permit relief. As the Second Circuit has aptly responded:

> [W]e know of no principle of law that would relate the availability of relief inversely to the gravity of the wrong sought to be redressed.

Oneida Indian Nation of New York v. *State of New York*, 691 F.2d at 1083 (2d Cir. 1982).

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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BRIEF

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BRIEF *AMICI CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL CONGRESS OF AMERICAN INDIANS, SENECA NATION OF INDIANS OF NEW YORK AND SEMINOLE TRIBE OF FLORIDA IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36.2, the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016; the National Congress of American

Indians, a corporation having its principal office at 804 D Street, N.E., Washington, D.C. 20002; the Seneca Nation of Indians of New York, having its principal office at P.O. Box 231, Salamanca, New York 14779; and the Seminole Tribe of Florida, having its principal office at 6073 Stirling Road, Hollywood, Florida 33024; file the attached brief *amici curiae* in support of the respondents in the above-captioned case. Petitioners, the Counties of Oneida and Madison, New York and the State of New York, and Respondents, the Oneida Indian Nation, et al., have consented in writing to the filing of this brief.

INTEREST OF *AMICI CURIAE*

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Solem* v. *Bartlett*, 104 S.Ct. 1161 (1984), *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968), and *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685 (1965).

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined popula-

tion of over 750,000 American Indian and Alaska Native people. NCAI and its membership have a profound concern with the ability of Indian tribes to protect their property rights. Such property rights are critical to the survival of Indian tribes as distinct cultural entities, and to the economic development desperately needed to break the cycle of poverty which has plagued Indian people for generations.

The Seneca Nation of Indians of New York and the Seminole Tribe of Florida are federally recognized Indian tribes which exercise powers of self-government. The Seneca Nation and Seminole Tribe have engaged in litigation under 25 U.S.C. § 177 in defense of their property rights. Were the Court to rule that Indian tribes lack the power to protect their property rights under § 177, these Indian governments would be deprived of one of the few remaining means by which they may defend their reservation lands from illegal takings.

This case presents grave questions of: (1) the continuing ability of Indian tribal governments to sue in defense of property rights protected by 25 U.S.C. § 177; and (2) the standard by which the courts determine whether any given act of Congress extinguishes tribal land title.

In order to facilitate the Court's consideration of the extremely broad legal and policy implications of this case, *amici* have chosen to address the two issues noted above in a manner somewhat different than the respondents. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) the Court previously has entertained actions by both the United States and Indian tribes predicated on the Trade and Intercourse Acts, and Congress has manifested its understanding that such suits are appropriate; (2) congressional ratification of illegal takings of Indian land can be accomplished only by legislation which expresses a plain and unambiguous

congressional intent to do so; and (3) a decision by this Court that tribes have no right to sue for violations of the Trade and Intercourse Acts will deprive tribes throughout the nation of the ability currently to defend their property against unauthorized expropriation.

SUMMARY OF ARGUMENT

Indian tribes generally have capacity to maintain suit for the protection of their property, a status under law which has existed from the very inception of this nation and which was acknowledged as early as 1790 by President Washington. This Court and the lower federal courts also have recognized the specific right of the United States and Indian tribes, jointly or separately, to sue for redress of violations of the Trade and Intercourse Acts. Such suits not only address ancient wrongs, but serve more particularly to protect reservation lands currently from unauthorized invasions or illegal expropriations.

In accordance with applicable canons of statutory construction, Indian tribes have possessed an implied right of action under all the Trade and Intercourse Acts. In addition to the language and legislative histories of these Acts, Congress clearly manifested its intent to sanction private suits by Indian tribes through an 1822 amendment to the 1802 Act assigning the burden of proof in trials concerning property rights "in which Indians shall be a party. . . ." Indian tribes were the intended beneficiaries of the Trade and Intercourse Acts, and suits by tribes to redress violations of the Act obviously further the legislative purpose.

Congressional ratification of illegal takings of Indian land may not be implied absent a showing of a plain and unambiguous legislative intent to achieve that result. Such an intent does not exist in this case.

ARGUMENT

I. This Court and Congress both have recognized that the Trade and Intercourse Acts authorize suits by the United States and Indian tribes to preserve or redeem interests in land.

A. This Court already has determined that Indian tribes may sue to preserve or redeem tribal property rights.

The seminal case regarding the right of Indian tribes to sue in order to protect their real property interests is *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919). In that case, the Pueblo sued to enjoin the Secretary of the Interior from disposing of lands in which the Pueblo claimed a property interest. The United States defended on the ground that the Pueblo was not a legal entity and lacked capacity to sue. This Court rejected the argument, noting first that the Pueblo's status as an Indian government[1] alone was sufficient to give it the capacity to sue:

> During the Spanish, as also the Mexican, dominion, it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. *With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests.*

249 U.S. at 112. (Emphasis added.)

The Court ultimately relied upon a territorial statute in holding that the Pueblo could maintain its suit. *Id.* The *Lane* case, however, is memorable for the precedential views expressed therein regarding the general capacity

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[1] The rule that Indian pueblos have essentially the same status as Indian tribes was established in *United States* v. *Sandoval*, 231 U.S. 28 (1913).

of Indian tribes to sue in defense of their property. Thus, in *Creek Nation* v. *United States*, 318 U.S. 629, 640 (1943), the Court observed, citing *Lane* and other cases, that the Creek Nation and Seminole Nation "had . . . as a general legal right . . . the power to bring actions on their own behalf." Similarly, in *Poafpybitty* v. *Skelly Oil Company*, 390 U.S. 365 (1968), the Court quoted with approval a lower court statement that the past decisions of this Court "clearly recognized the rights of . . . Indian tribes or pueblos to maintain actions with respect to their lands. . . ." *Id.* at 371, quoting *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456, 459 (10th Cir. 1951).

Petitioners do not dispute tribal capacity to sue, but argue instead that judicial recognition of such capacity is a recent phenomenon. Thus, they posit, Congress could not have intended to allow actions by tribes to redeem rights granted under the 1793 Act. Act of March 1, 1793, c. 19, § 8, 1 Stat. 329, 330. What the petitioners fail to mention is that questions about tribal capacity to sue arose towards the beginning of the Twentieth Century, not the Nineteenth, and, when the issue finally was raised, it was resolved in the tribes' favor in no uncertain terms: "Of their capacity to maintain such a suit, we entertain no doubt." *Lane*, *supra*, 249 U.S. at 113.

In the landmark case of *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), this Court decided that an Indian tribe is a "state,"[2] but not a "foreign state"

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[2] Just as the Pueblo of Santa Rosa under Spanish and Mexican law, the Cherokee Nation under American law "enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property." *Cf. Lane* v. *Pueblo of Santa Rosa*, *supra*, 249 U.S. at 112. Having the capacity to treat with the United States for the purpose of acquiring, ceding and selling real property, the Cherokee Nation must have had the capacity to sue for the protection of those rights. *Id.*

within the meaning of Article III of the Constitution and, therefore, not capable of bringing an original petition against one of the United States in the Supreme Court. *Id.* at 15-16. In so holding, the Court not only did not question the Cherokee Nation's capacity to sue, but impliedly affirmed that right, saying: "If it be true that the Cherokee Nation have rights, *this is not the tribunal in which those rights are to be asserted.*" *Id.* at 20 (emphasis added). Thus, in the Court's view, the issue was not whether the Cherokee Nation could sue, but, rather, in what court it might do so.[3] Petitioners' reliance upon *Cherokee Nation* for the proposition that Indian tribes long were regarded as lacking capacity to sue, therefore, is wholly misplaced.[4] *See also Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902).

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[3] Significantly, one of the claims of the Cherokee Nation was that the Georgia laws violated the Trade and Intercourse Act of 1802. *Cherokee Nation*, *supra*, 30 U.S. at 7.

[4] Petitioners' reliance on *Jaeger* v. *United States*, 27 Ct. Cl. 278 (1892) also is misplaced. The *Jaeger* court suggested in *dicta* that *Cherokee Nation* and other cases discussing the wardship status of Indian tribes yielded a general lack of capacity to sue. The *Jaeger* court simply was mistaken, perhaps because Indian tribes expressly were barred from filing suit in the Court of Claims—a statutory bar, incidentally, which need not have been created if the tribes had no capacity to sue. *See* § 9 of the Act of March 3, 1863, c. 92, 12 Stat. 765, 767; § 1 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505. Later decisions of this Court make clear that the tribes' status as wards of the federal government imposes no disability in terms of their right to sue to protect their property rights. *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Lane* v. *Pueblo of Santa Rosa*, *supra*. That few cases involving tribes were brought in federal courts reflects the fact that they were courts of limited jurisdiction, not a lack of tribal capacity.

B. This Court and lower federal courts have recognized implicitly the validity and justiciability of suits brought to redeem tribal property rights guaranteed under the Trade and Intercourse Acts.

In *United States* v. *Candelaria*, 271 U.S. 432 (1926), the United States filed suit to quiet title against certain persons who were asserting what was alleged to be a false claim to certain lands belonging to the Pueblo of Laguna by virtue of a Spanish grant. "The suit was brought on the theory that these Indians are wards of the United States and that it therefore has authority and is under a duty to protect them in the ownership and enjoyment of their lands." *Id.* at 437. Although the source of the defendants' claim of title to the lands is not made clear in the opinion, two prior court decrees were asserted by the defendants as a bar to the suit. The United States had not participated in the prior litigation.

The key issue in *Candelaria* was whether the previous judgments passed good title to the defendants. This Court ruled that they did not because they were not rendered in compliance with the Trade and Intercourse Acts. Specifically, after noting the existence of both the 1834 Act and an 1851 statute extending that Act's coverage to tribes in New Mexico (271 U.S. at 441, citing Act of June 30, 1834, c. 161, § 12, 4 Stat. 729, 730, 25 U.S.C. § 177), the Court said:

> A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree.

Candelaria, *supra*, 271 U.S. at 443-44. Thus, in a case in which, like the case at bar, a Trade and Intercourse Act right underlay the claim, the United States was

found capable of filing suit to redeem the property of an Indian tribe.

The authority of the United States to file suit under the 1834 Act never has been deemed exclusive. Accordingly, in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Tuscarora Nation intervened in a Federal Power Commission proceeding in which an application for a project license by the Power Authority of the State of New York was under consideration. The Tuscaroras urged that the Power Authority lacked the ability to condemn tribal land, since such a condemnation would violate the Trade and Intercourse Act. *Id.* at 118-19. The Court ruled that, as a federal licensee, the Power Authority stood on the same footing as the United States, and because the Trade and Intercourse Act did not apply to takings of Indian land by the United States, neither did it apply to the taking by the Power Authority. At no point, however, did the Court question the Tuscarora Nation's ability to raise the Trade and Intercourse Act in defense of its property rights.

Representative cases in the lower federal courts also show the validity of tribal suits under the Trade and Intercourse Acts as well as the versatility, vitality and continued utility of the 1834 Act, even outside the context of the eastern Indian land claims.[8] Thus, in *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976), both a tribe and the United States successfully sued for relief from an alleged easement granted in violation of § 177. Moreover, in *Assiniboine and Sioux Tribes* v. *Calvert Exploration Co.*, 223 F. Supp.

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[8] *Cf. Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927) (An improvident contract between a tribe and an attorney found void under § 177); *The New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867) (Title acquired pursuant to a tax sale for taxes illegally assessed on tribal property can be voided under the Trade and Intercourse Act).

909 (D. Mont. 1963), *rev'd sub nom., Yeder* v. *Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964), the Tribes alone employed § 177 as a basis for a suit to prevent tribal lands from being pooled with the lands of others to form a "spacing unit" for oil and gas development. In *Seneca Nation* v. *New York*, 397 F. Supp. 685 (W.D. N.Y. 1975), the tribe used § 177 to block a wrongful taking of reservation lands for highway purposes.[6]

In short, for the Court to rule that the Oneida Nation does not possess a right to sue under the 1793 Act would be to reverse longstanding judicial precedents, including prior decisions of this Court, and to strip from Indian tribes today a key weapon in the very limited arsenal they retain to protect their lands from invasion and abuse.

C. Congress has manifested an understanding that the 1834 Trade and Intercourse Act and its predecessors authorize suits by tribes to protect their property rights and, because the 1793 Act is substantively identical to the other statutes, causes of action which exist under the 1834 Act necessarily are proper under the 1793 Act.

The cases discussed above which were founded upon the Trade and Intercourse Act, as well as those upholding the right of tribes to sue to protect and redeem their property interests, all arose after the 1793 Act had expired and had been replaced by later legislation. Of par-

[6] The courts are open even to non-Indians to make claims under the Trade and Intercourse Act. Thus, in *Marsh* v. *Brooks*, 49 U.S. 223, 233 (1850), the Court remarked "That an action in ejectment could be maintained on an Indian right to occupancy and use, is not open to question." To say that an act passed to "prevent unfair, improvident or improper dispositions by Indians of land owned or possessed by them," *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960), may be relied upon in court by non-Indians, but not by the Indians for whose protection the statute was passed, is nonsensical.

ticular importance among these successor statutes is, of course, the provision of the 1834 Act, c. 161, § 12, 4 Stat. 730, which now is codified at 25 U.S.C. § 177. Section 8 of the 1793 Act is identical in its substantive aspects to § 12 of the 1834 Act, as are the pertinent provisions of the Acts of 1790, 1796, 1799 and 1802.[7] In short, in terms of whether their language forms the basis for a tribal cause of action, all the Trade and Intercourse Acts are indistinguishable.

Moreover, an 1822 amendment to the 1802 Act (Act of May 6, 1822, c. 58, § 4, 3 Stat. 682, 683) strongly suggests that all the former Acts were intended to authorize actions by Indians for the protection of their property interests. That amendment provided:

> [I]n all trials about the right of property, in which Indians shall be a party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.[8]

If the 1822 Act had contained a provision specifically authorizing suits by Indians to protect their rights, a possible argument could be made that this amendment author-

[7] Compare Act of July 22, 1790, c. 33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, c. 19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, c. 30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, c. 46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, c. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, c. 161, § 12, 4 Stat. 729, 730.

[8] The amendment clearly contemplates suits in which the Indian parties are the plaintiffs. If a white person filed suit against an Indian, as the plaintiff, the white person would bear the burden of proof even in the absence of the 1822 amendment. Thus, the amendment must have been intended to apply to suits brought by Indian plaintiffs against non-Indian defendants, lest it be rendered a redundancy. Indeed, Indian tribes could not be named defendants in a title dispute because of their sovereign immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978).

ized such actions where the Acts of 1790, 1793, 1796, 1799 and 1802 did not. No such provision exists, however. The only provisions of the Acts which conceivably could give rise to "trials about the right of property" between an Indian and a non-Indian are the counterparts of § 12 of the 1834 Act. Those sections, being identical in substance to Section 8 of the 1793 Act, must have the same effect of giving rise to a cause of action. In other words, rather than creating a cause of action which had not existed previously, the 1822 amendment to the 1802 Act merely created a new rule regarding the burden of proof in a cause of action which had existed since passage of the first Trade and Intercourse Act in 1790. Thus, Congress long ago made clear its understanding that Indians have capacity to sue under the Trade and Intercourse Acts.

That understanding continues through modern times. As recently as 1966, for example, Congress enacted legislation for the primary purpose of removing the $10,000 jurisdictional limitation of 28 U.S.C. § 1331(a) in suits involving Indian tribes and raising a federal question. Pub. L. 89-635, § 1, 80 Stat. 880 (1966), codified at 28 U.S.C. § 1362. In considering that legislation, the House Judiciary Committee expressed particular concern about the decision in *Yoder* v. *Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). *See* H. Rep. 2040, 89th Cong., 2d Sess. 2-3 (1966).

In *Yoder*, the Tribes had filed suit to enjoin the enforcement of a State order requiring that lands owned by the tribes be pooled with lands owned by another to form a "spacing unit" for the drilling of an oil and gas well. The Tribes sued on the theory, *inter alia*, that the State order "constituted an alienation of tribal property in violation of 25 U.S.C. § 177. . . ." *Assiniboine and Sioux Tribes* v. *Calvert Exploration Co.*, 223 F. Supp. 909, 912 (D. Mont. 1963). The Court of Appeals, however, held that the federal courts lacked jurisdiction over the matter because of the Tribes' failure to establish the $10,000 minimum. *Yoder* v. *Assiniboine and Sioux Tribes*, *supra*, 339 F.2d at 364. In eliminating that rule, Congress made plain its awareness and approval of suits by tribes to vindicate property rights under the Trade and Intercourse Acts.

Another indication of Congress' continuing belief in the tribes' right to sue is found in 28 U.S.C. § 2415. In 1982, Congress made the statute of limitations on claims for money damages brought by the United States also applicable to Indian tribes. Two important points arise from § 2415. First, the statute clearly recognizes the right of Indian tribes to sue in defense of their property rights. Second, the statute expressly exempts from its coverage actions "to establish the title to, or right to possession of, real or personal property." § 2415(c). Thus, Congress both recognized tribal capacity to sue for possession of property and refused to limit the time for bringing such actions. Congress did so fully aware of the land claims by tribes then and still pending in the courts.

Finally, the recent spate of legislation settling various tribal land claims under the Trade and Intercourse Acts reflects Congress' current understanding that such suits are proper.[9] Although Congress undoubtedly did not intend to suggest its views on the merits of any of these claims, the acts reflect at least a congressional belief that the tribal causes of action, in the abstract, were sound.

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[9] The settlement acts passed thus far are: Rhode Island Indian Claims Settlement Act, Pub. L. 95-395, 92 Stat. 813 (1978), codified at 25 U.S.C. §§ 1701-1716; Maine Indian Claims Settlement Act, Pub. L. 96-420, 94 Stat. 1785 (1980), codified at 25 U.S.C. §§ 1721-1735; Florida Indian Land Claims Settlement Act, Pub. L. 97-399, 96 Stat. 2012 (1982), codified at 25 U.S.C. §§ 1741-1749; and Mashantucket Pequot Indian Claims Settlement Act, Pub. L. 98-134, 97 Stat. 851 (1983), codified at 25 U.S.C. §§ 1751-1760.

The legislative histories of these statutes give no indication that Congress entertained any doubt as to the theoretical validity of tribal claims under the Trade and Intercourse Acts.

In summary, this Court on several occasions has taken cognizance of tribal claims arising under the Trade and Intercourse Act of 1834. The 1834 Act being identical to its predecessors in all pertinent respects, the same result must obtain with regard to the prior acts. Because Indian tribes always have been recognized as having capacity to sue in defense of their property rights, and because the tribes are the intended beneficiaries of the Acts, they necessarily are able to sue for violations of the Acts. (*See* Point II, *infra*.) This result is consistent with the understanding and intent of the Congress when the laws were enacted and of Congress presently.

II. The Oneida Nation and other Indian tribes have an implied right of action under the 1793 Trade and Intercourse Act and successor statutes.

A. The declaratory language of the 1793 Act and its legislative history, analyzed in light of the law of that time, demonstrate a plain intent on the part of Congress to recognize a right of action for Indian tribes.

In determining whether a federal statute gives rise to a cause of action for a private party, the intent of Congress governs. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981). The statutory language, of course, is critical. Section 8 of the 1793 Act provided that "no purchase or grant of lands . . . from any Indians or nation or tribe of Indians . . . shall be of any validity in law or equity. . ." unless made in compliance with the Act. 1 Stat. 330. This language, read in light of the prevailing rules of law existing at the time of its

enactment,[10] clearly was intended to recognize and confer a right of action in and to Indian tribes for violations of the Act. More specifically, three aspects of the contemporary legal context within which the 1793 Act was adopted combine to erase all doubt as to the intent of Congress: (1) the law of Indian title; (2) the law regarding remedies for breaches of rights; and (3) the law regarding tribal capacity to sue.

Tribal property rights unquestionably were accorded legal validity and effect under American law from the earliest days of the nation. Thus, in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the Court observed that, at the time of their discovery by the Europeans, Indian tribes "were admitted to be the rightful occupants of the soil, *with a legal as well as just claim to retain possession of it. . . .*" *Id.* at 574 (emphasis added). The only defect in Indian title was that "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied. . . ." *Id.* These rules of law predated the Constitution, and the 1793 Act merely codified the rules which existed at common law. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 678 (1974).

The Indian right of occupancy was not a naked right lacking means of enforcement. "That an action in ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in *Johnson* v. *M'Intosh*. . . ." *Marsh* v. *Brooks*, 49 U.S. 223, 232 (1850). No other rule could be said to exist. Except where a remedy was afforded by the mere act of the parties or by mere operation of law, the common law held that "where there is a legal

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[10] This Court previously has recognized the significance of the contemporary legal context under which a statute is enacted. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982).

right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." III *Blackstone Commentaries* 23 (1st ed. 1768).

The rule that a right could not exist without remedy applied to rights recognized or created by statute, particularly the simpler statutes of that simpler time:

> "When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. . . . Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.

Merrill Lynch, Pierce, Fenner & Smith v. *Curran*, *supra*, 456 U.S. at 374-75. *And see Texas & Pacific Railway Co.* v. *Rigsby*, 241 U.S. 33 (1916). Indian tribes clearly were the intended beneficiaries of the 1793 Act, *see* discussion below, and the courts, therefore, would imply a remedy for invasions of the statutory right.[11]

Finally, all three branches of government in the early Nineteenth Century shared a belief that tribes were

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[11] The courts did so on numerous occasions under the 1834 Act, the operative provision of which is identical in substance to § 8 of the 1793 Act. *See* discussion, *supra*, at 9-10. Thus, in *United States* v. *Boylan*, 265 F. 165 (2d Cir. 1920), the United States sued on behalf of the Oneidas to set aside a conveyance and partition judgment under the 1834 Act. Several similar suits have been sanctioned by this Court and lower federal courts. *See United States* v. *Candelaria*, *supra*; *United States* v. *Calvard*, 89 F.2d 312 (4th Cir. 1937); *United States* v. *7,505.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *McCarty* v. *Hollis*, 120 F.2d 540 (10th Cir. 1941); *United States* v. *Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom.*, *City of Salamanca* v. *United States*, 316 U.S. 694 (1942); *United States* v. *City of Salamanca*, 27 F. Supp. 541 (W.D.N.Y. 1939).

capable suitors. The executive branch so believed, as can be seen in President Washington's speech to the Seneca Nation in 1790: "Here, then, is the security for the remainder of your lands. . . . [T]he federal courts will be open to you for redress. . . ." I *American State Papers, Indian Affairs* 139 (1834). Congress concurred in this view, as may be seen in the Act of May 6, 1822, *supra*, apportioning the burden of proof in "trials about the right of property in which Indians shall be a party on one side and white persons on the other. . . ." *See* discussion, *supra*, at 11-12. This Court never doubted the right of Indian tribes to sue to protect their interests. *See* discussion, *supra*, at 6-7, concerning the 1831 case of *Cherokee Nation* v. *Georgia*.

Certainly by the time Congress considered the 1834 Act, it was aware that Indian tribes were assumed to possess legal capacity to sue. Had it not concurred in this assumption, Congress could and undoubtedly would have expressed its disagreement by altering the operative provisions of the Trade and Intercourse Act. By reenacting the provisions of prior acts without material amendment, Congress indicated its acceptance of the status quo and its intent that tribes would continue to be able to maintain suits.

The statutory language plainly speaks to the existence of a private right of action. By declaring void conveyances made in violation of the Act, Congress must have intended that tribes have "the customary legal incident" of that declaration—a right of action. *Cf.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979). This is particularly true in light of this Court's rule of construction that ambiguities in statutes enacted for the benefit of Indians must be resolved in their favor. *E.g.*, *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982); *see also* cases cited *infra*, n.15.

Another major Indian land law has been construed on many occasions to provide a cause of action where none is granted expressly. The General Allotment Act of 1887, c. 119, § 5, 24 Stat. 389, 25 U.S.C. § 348, provides that conveyances of Indian allotments prior to the expiration of the trust period "shall be void and of no effect." Although no right of action is authorized expressly, this Court and others often have recognized actions under the General Allotment Act and similar statutes. Many such actions have been brought by the United States, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413 (1912); *Mullen* v. *United States*, 224 U.S. 448 (1912); *Watson* v. *United States*, 263 F. 700 (8th Cir. 1920); but other suits were brought by the Indian allottees themselves. *E.g.*, *Poafpybitty* v. *Skelly Oil Co.*, *supra*; *cf.*, *Marchie Tiger* v. *Western Investment Co.*, 221 U.S. 286 (1911).

Recognition of a tribal right of action under the 1793 Act, therefore, is consistent with the statutory language and legislative history, the prevailing law as of that date, and judicial construction of similar statutes passed for the benefit of Indians.

B. Indian tribes were the intended beneficiaries of the Trade and Intercourse Acts, and suits by tribes to redress violations of the Acts further the legislative purpose.

In determining whether a statute gives rise to a cause of action, a key inquiry is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff?" *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (citations omitted). In this case, the answer to this inquiry clearly must be in the affirmative. As the court below observed, "the language and purpose of the 1793 Act are unequivocal in their purpose to protect the Indians." *Oneida Indian Nation* v. *County of Oneida*,

719 F.2d 525, 533 (2d Cir. 1983). *See, e.g.*, *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979).

Petitioners attempt to escape this result by arguing that the sole purpose of the Act was to ensure the orderly advance of the frontier by preventing uprisings by the Indians. (Counties' Br. at 24; State's Br. at 21, n.) To be sure, the ultimate goal of all federal policy during this era was the advancement of the frontier and the preservation of peace. F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (1962) at 3. The petitioners' argument, however, fails to comprehend that the Trade and Intercourse Acts furthered these general policy goals by giving effect to the particular goal of protecting Indians in their property rights. "The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and *providing justice to the Indians as the means of preventing hostility.*" F. Prucha, *id.* (emphasis added). Thus, the Oneida Nation is part "of the class for whose *especial* benefit the statute was enacted. . . ." *Cort* v. *Ash*, *supra*, at 78. The Trade and Intercourse Acts "create[d] a federal right in favor of the plaintiff", *id.*, and all other tribes, for the purpose of protecting their property rights, so that the overall goal of American policy—orderly advancement of the frontier—would be furthered.

Another relevant inquiry is whether implying a private right of action is consistent with the legislative purpose. *Cort* v. *Ash*, *supra*, at 78. As the court below noted, "the purposes of the 1793 Trade and Intercourse Act are best served by the implication of a private right of action." 719 F.2d at 536. That conclusion seems self-evident. Quite obviously, private actions by Indians further the Act's purpose of protecting Indian property rights.

The Counties present a fatuous argument to the effect that removal of trespassers by the military better served the cause of peace on the frontier than did private civil litigation. (Counties' Br. at 21-23.) That the cause of peace is better served by military action than the civility and solemnity of the courtroom is a proposition unworthy of consideration.[13]

C. Because Indian property rights are the exclusive domain of federal law in which state law is without effect, inference of a cause of action based solely on federal law is most appropriate.

Indian property rights clearly are the exclusive domain of federal law. As this Court observed in *Oneida Indian Nation* v. *County of Oneida*, *supra*, "Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law." 414 U.S. at 667. Thus, a cause of action under the Trade and Intercourse Act clearly is not one

> traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. . . .

Cort v. *Ash*, *supra*, 422 U.S. at 78. Indeed, the property rights of tribes are so clearly the domain of federal law as to demand recognition of a cause of action for Indian tribes to protect those rights.

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[13] The Counties also argue that the "numerous express remedies" contained in the 1793 Act (Counties' Br. at 23) were sufficient to serve the Act's purpose. In fact, only two remedies are provided for expressly: criminal fines and imprisonment. The reference to "numerous" remedies for the violations of provisions of the Act unrelated to Indian land is an attempt to distract the attention of the Court. Moreover, the 1790 Act contained no express remedy for unauthorized conveyances of Indian land. Thus, unless a private action is implied, Congress had created a right without remedy—the bane of the law.

III. The rule that ratification of a treaty extinguishing Indian title may not be implied in the absence of an expression of plain and unambiguous congressional intent rests on settled doctrines of statutory construction that are of fundamental importance to the protection of Indian property rights.

The Court of Appeals, applying the seminal standard articulated in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), held that any implied ratification of the 1795 New York-Oneida treaty could be based only upon a "plain and unambiguous" expression of intent by Congress. 719 F.2d at 539. Petitioner Counties have urged rejection of that test and have proposed the following tortured language to replace it:[14]

> [T]here need only be explicit recognition by the federal government of the transaction in issue in a manner that reveals the implicit approval thereof.[14]

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[14] In arguing that it has shown "plain and unambiguous congressional intent" for a subsequent ratification of the 1795 New York-Oneida transaction, the State tacitly has acknowledged the correctness of the "plain and unambiguous" standard. *See* State's Br. at 36.

[14] Counties' Br. at 41. This proposed test is derived from language in the Court of Claims' decision in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912 (1965). The court in *Seneca Nation* failed to mention *Santa Fe Pacific* and, instead, articulated a new test based on "explicit recognition and implicit ratification," *Seneca Nation*, *supra*, at 915. That formulation has not been followed by any other court.

The relevant statute in *Seneca Nation*, Act of January 5, 1927, c. 22, 44 Stat. 932 (1927), applied New York State hunting and fishing laws to the Seneca reservations, with a proviso that "this act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York in condemnation proceedings." Although the statute thus reveals a congressional awareness that a land transaction had occurred, it reveals no understanding on Congress' part that the transaction lacked validity under the Trade and Intercourse Act of 1834 or that Congress' action would extinguish the Senecas' title. This language, therefore, falls far short of the "plain and unambiguous" standard. To extinguish Indian title, Congress must be aware, at least, that

The Counties expand even this vague rubric by arguing that "ratification need not be explicit to be effective" (Counties' Br. at 41), and further suggest that "the intent of the government" to ratify can be gleaned from four "factors"—

> (a) the operative language of the statute or treaty, (b) legislative history, (c) the surrounding circumstances, and (d) the historical exercise of state or tribal jurisdiction over the territory.

Counties' Br. at 41.

The Counties' four factors are derived from cases involving acts of Congress opening portions of Indian reservations to white settlement and the problem of whether such actions were intended to diminish the reservations by disestablishing the opened areas. *See, e.g., Solem* v. *Bartlett*, 104 S.Ct. 1161 (1984); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 603 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425, 442 (1975). In these "disestablishment" cases, the issue presented always involves jurisdiction, not land ownership. The court below correctly understood that subsequent ratification is a form of extinguishment of Indian title and rejected the factors proposed by the Counties. *See* 719 F.2d at 539. "The question of whether title to Indian land has been extinguished is separate from the question of disestablishment." *Idaho* v. *Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983). In short, the Counties rely for their ratification test upon wholly inapposite cases.

It may be doing so. The *Seneca Nation* case, then, clearly was wrongly decided, and stands as a monument to the mischief occasioned by applying any standard short of *Santa Fe*'s "plain and ambiguous" requirement.

In any event, the court in *Seneca Nation* expressly cautioned that a claim that the transaction was inequitable might change its reasoning. 173 Ct. Cl. at 915-16. The Oneidas make such a claim in this case and *Seneca Nation*, therefore, is inapplicable.

The Counties' argument also ignores the basic principle that ambiguous Indian treaty or statutory language must be construed in favor of the Indians.[10] In essence, these petitioners assert that evidence of the "government's" intent to ratify an otherwise invalid treaty of extinguishment can be gleaned from unconnected sources without any clear showing that *Congress* itself intended to ratify the questioned treaty. The standard proposed by the Counties sweeps aside well-settled precedent to the contrary, *e.g., United States* v. *Santa Fe Pacific Railroad Co., supra*, and, more particularly, the unique trust relationship between the United States and Indian tribes. *See, e.g., Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942). The danger of their proposal is made clear when it is considered that the rule of statutory construction followed by the court below is but one aspect of the broader principle that Indian title, whether by occupancy or treaty, cannot be extinguished, diminished, abrogated, or taken by subsequent repeal or ratification without a showing of plain and unambiguous congressional intent to do so. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Santa Fe Pacific Railroad Co., supra*.

The courts have applied the same essential standard to all cases in which congressional action is argued to have eliminated an Indian property right. The party disputing the Indian property right must demonstrate that Congress clearly intended to eliminate that right. In *Menominee Tribe* v. *United States, supra*, for example, the Court rejected an argument that Congress implicitly repealed treaty hunting and fishing rights in passing the Menominee Termination Act for the "intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Id.* at 413. Similarly, in *Washington* v.

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[10] *See, e.g., Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal For Codification*, 17 U. Mich. J.L. Ref. —— (1984).

Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), the Court refused to find that a United States-Canadian Convention dividing salmon catches implicitly abrogated Indian treaty fishing rights. "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . ." *Id.* at 690.[16]

The Counties and the State (*see* n.13, *supra*) fail to meet the "plain and unambiguous" standard and, indeed, to meet even the Counties' own vague test. No statutory language or legislative history exists in this case which shows congressional awareness of the 1795 treaty.[17] As

[16] *See also Antoine* v. *Washington*, 420 U.S. 194, 206 (1974) (ratifying legislation exempted Indian hunting rights from state regulation, for it would be "impermissible in the absence of explicit congressional expression to construe the implementing Acts as [preserving nothing that the Indians would not have had without the legislation]"); *Klamath Indian Tribe* v. *Oregon Dept. of Fish and Wildlife*, 729 F.2d 639 (9th Cir. 1984) (holding that Congress did not clearly intend to abrogate hunting and fishing rights on ceded land); *Confederated Salish & Kootenai Tribes* v. *Namen*, 665 F.2d 951, 955 (9th Cir. 1982) (holding that congressional intent to terminate reservation status was not clearly shown); *Plains Electric Generation and Transmission Cooperative, Inc.* v. *Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976) (preserving Indian lands by finding that Congress clearly intended to repeal a statute permitting condemnation of Pueblo lands without the consent of the Pueblos or the Secretary of the Interior); *New Mexico* v. *Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976) ("Any intent of Congress to relinquish its jurisdiction and control over the lands and water rights of the Pueblos must be express. It may not be implied from a tortuous construction. . . .").

[17] The Counties insist that the phrases "in the last purchase from them" in the 1798 Treaty and "other lands heretofore ceded" in the 1802 Treaty are "explicit evidence that the federal government deemed [the 1795 transaction] effective to pass valid title." Counties' Br. at 43. Isolated metes and bounds phrases *drafted by the State of New York* in the subsequent treaties, however, "indicate" neither congressional awareness nor approval of the illegal 1795 transaction. The language in Congress' ratification of the 1798 or 1802 Treaties makes no mention of the 1795 agreement or of the

a consequence of this flaw in their syllogism, petitioners are forced to rest their argument on the "surrounding circumstances." Aside from being irrelevant to the issue of extinguishment, these historical events are at most ambiguous and essentially consistent with the finding of the court below that Congress, in ratifying the 1798 and 1802 treaties, was unaware of the reference in the metes and bounds descriptions to the void 1795 transaction.[18]

Stripped of its judicial facade, petitioners' argument is nothing more than an appeal to expediency. In essence, their argument comes to this: Because some federal and state officials may have believed, through the years, that the lands in question passed out of Indian ownership, the State of New York should be allowed to keep the benefit of its admittedly unlawful act. Petitioners are asking the Court to abandon long-settled and fundamental doctrines evolved for the protection of Indian property rights and to find "implicit" subsequent ratification of a void treaty.

Congress has determined that the protection of Indian property rights found in the Trade and Intercourse Act still is necessary. This congressional decision should not be undermined by the adoption of the Counties' mis-

illegality of the agreement. As stated by this Court in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 351 (1945), "[t]he meaning of the word or phrase depends upon its use. In these treaties it seems clearly to designate the boundaries . . . but that falls short of acknowledgement . . . by the United States."

[18] The Counties rely on several factors supposedly evidencing congressional intent. The Counties refer to the attempts of federal agents to prevent the 1795 treaty before it was made. The acts of these agents in 1795 do not translate into congressional knowledge in 1798 and 1802 that the metes and bounds descriptions in the subsequent treaties referred to the 1795 transactions. The Counties also argue that Congress would have sanctioned "nonsensically circumscribed tracts of land", Counties' Br. at 43, if the language in the 1798 and 1802 treaties referred to the 1795 treaty calls. While Congress may have thought the tracts abutted *some* earlier purchase, this would not necessarily have been the 1795 transaction.

chievous and illogical "ratification" test. Approval of the petitioners' plea would be a shocking and unwarranted departure from the basic principles of Indian law that serve today as essential protection for Indian reservation lands.

CONCLUSION

The basic thrust of petitioners' argument is their bald assertion that affirmance of the holding below will result in social upheaval—the invalidation of titles to millions of acres and, *inter alia*, the eviction of thousands of innocent homeowners. The modest prayer of the Oneida Nation in this case and the moderate settlements already accepted by other eastern Indian tribes belie this wholly unjustified charge. Moreover, should a tribe in the future prove unreasonable in its demands, the courts can tailor their equitable relief to modern reality and, of course, Congress still claims the ultimate power of ratifying today in plain and unambiguous language a land transaction otherwise in violation of 25 U.S.C. § 177.

Past precedents of this Court and the manifest intent of Congress are contrary to the petitioners' position. Their scare tactics in the face of such adversity are unwarranted and inappropriate. The decision of the Court of Appeals should be sustained.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Nos. 83-1965 and 83-1260

In the Supreme Court of the United States

OCTOBER TERM, 1984

COUNTY OF ONEIDA, NEW YORK, ET AL., PETITIONERS

v.

ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

STATE OF NEW YORK, PETITIONER

v.

ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the respondent groups of Oneida Indians have a cause of action under federal law to recover damages for the use and occupation of land that was part of the Oneida Indian Nation's aboriginal homeland, protected by federal treaties, and purchased from the Oneida Nation by the State of New York in 1795 in a transaction that was invalid under federal law because it was not approved by the United States.

2. Whether the Indians' suit must be dismissed because it presents non-justiciable political questions.

3. Whether the Indians' suit is time-barred because (a) a state statute of limitations that would bar the suit should be incorporated into federal law, or (b) the cause of action abated upon the expiration of the Trade and Intercourse Act of 1793 or its successors enacted in 1796 and 1799.

4. Whether New York's unauthorized acquisition of the land in 1795 subsequently was ratified by federally approved treaties in 1798 and 1802.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1065

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v.

ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

No. 83-1240

STATE OF NEW YORK, PETITIONER

v.

ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This Brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

HISTORICAL BACKGROUND

1. The aboriginal home of the Oneida Nation was a 6 million-acre strip of land approximately 50 miles wide running in a north-south direction through east-central New York (Pet. App. 19a, 29a).[1] During the Revolution, the Oneida and Tuscarora Nations sided with the Colo-

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[1] "Pet. App." and "Supp. Pet. App." refer to the Appendix and Supplemental Appendix to the Petition for a Writ of Certiorari filed by the Counties of Oneida and Madison, New York, in No. 83-1065.

nists, and the other four of the Six Nations in New York sided with the British (Supp. Pet. App. 9a). After the War, the United States entered into the Treaty of Fort Stanwix of October 22, 1784 with the Six Nations (7 Stat. 15 *et seq.*), in which it gave peace to the four Nations that had sided with the British and provided that the loyal Oneida and Tuscarora Nations "shall be secured in the possession of the lands on which they are settled." Arts. I, II, 7 Stat. 15.

Soon after the Treaty of Fort Stanwix, the State of New York, without the approval of the federal government, obtained cessions of the Oneidas' land in 1785 and 1788. In the 1788 Treaty, the Oneidas "[did] cede and grant all their lands"—in excess of 5 million acres—"to the people of the State of New York forever," but "reserved" for themselves, also "forever," a tract of approximately 300,000 acres near Oneida Lake. Supp. Pet. App. 10a. After the 1788 transaction, the United States and the Six Nations entered into the Treaty of Fort Harmar of January 9, 1789 (7 Stat. 33 *et seq.*),[2] under which "[t]he Oneida and Tuscarora nations, are also again secured and affirmed in the possession of their respective lands." Art. 2, 7 Stat. 34.

2. In 1790, Congress enacted the first of the Trade and Intercourse Acts that long have embodied the essential features of federal Indian policy. 1 Stat. 137 *et seq.* Section 4 of that Act provided that "no sale of lands made by any Indians * * * shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138.

[2] In *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 121-122 n.18 (1960), this Court referred to the Treaty of Fort Harmar as "unratified." However, it appears that the Senate did not deem it necessary to give its advice and consent to that Treaty because negotiation of the Treaty had been authorized by the Continental Congress prior to the effective date of the Constitution. See 1 *American State Papers* (*Indian Affairs*) 88-89 (1832). The Treaty of Fort Harmar is printed in the Statutes at Large and, in our view, should be regarded as fully effective.

Section 8 of the Trade and Intercourse Act of 1793 carried forward the substance of Section 4 of the 1790 Act by providing that "no purchase or grant of lands, or of any title or claim thereto," from an Indian nation "shall be of any validity in law or equity" unless "made by a treaty or convention entered into pursuant to the constitution." 1 Stat. 330. Congress in 1793 also for the first time made it a criminal offense for any person not employed under the authority of the United States even to treat with the Indians "for the title or purchase of any lands by them held, or claimed." *Ibid.* However, Congress carved out an exception to the criminal prohibition permitting the agent of a State present at a treaty held under the authority of the United States—in the presence and with the approval of the federal commissioners—to "propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty." 1 Stat. 330-331. These provisions were carried forward without change in the Trade and Intercourse Acts of 1796, 1799, 1802 and 1834[3] and remain in effect today. 25 U.S.C. 177. *See Oneida Indian Nation* v. *County of Oneida* (*Oneida*), 414 U.S. 661, 668 & n.4 (1974).

3. After passage of the 1793 Act, the United States entered into the Treaty of Canandaigua of November 11, 1794 with the Six Nations. 7 Stat. 44 *et seq.* In Article II of that Treaty, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property." 7 Stat. 45. The United States stipulated that "the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase" (*ibid.*), and the Six Nations stipulated that "they will never claim any other lands within the boundaries of the United States." Art. IV, 7 Stat. 45.

[3] 1 Stat. 469, 472, § 12 (1796); 1 Stat. 743, 746, § 12 (1799); 2 Stat. 139, 143, § 12 (1802); 4 Stat. 729, 730, § 12 (1834).

4. Notwithstanding Section 8 of the 1793 Act, the State of New York, without federal participation or approval, negotiated directly with the Oneidas in 1795 for the purchase of some of the 300,000 acres that were reserved to them under their 1788 Treaty with the State and acknowledged by the Treaty of Canandaigua. Secretary of War Pickering informed Governor Jay that the Trade and Intercourse Act required that the purchase be negotiated under federal supervision and consummated pursuant to a federal treaty and informed the Oneidas that the purchase would be illegal in the absence of federal approval. Pet. App. 6a-7a; Supp. Pet. App. 11a-13a. Nevertheless, by an Indenture dated September 15, 1795, the State purchased approximately 100,000 acres of this land in return for an annual payment to the Oneidas of $2,952 (Pet. App. 76a, 78a)—approximately $.03 per acre. Within two years, the State sold much of the land to white settlers for approximately $3.50 per acre (Pet. App. 7a).[4]

5. Beginning as early as 1815, the State urged the removal of the New York Indians to the West. Some of the Indians, too, apparently came to believe that they should seek a new home. *New York Indians* v. *United States*, 170 U.S. 1, 6 n.1 (1898). In 1816, the President gave the New York Indians permission to negotiate with western Indian tribes for the purchase of land. In 1821, the Menominee Indians ceded some of their land in Wisconsin to several of the New York Tribes, including the Oneidas. Approximately 600 Oneidas settled in Wisconsin and approximately 600 remained behind at Oneida in New York. Because of a dispute between the New York Indians and the Menominees, the United States entered into the Treaty of February 8, 1831 with the Menominees to purchase certain of the Menominees' lands for the New York Indians. 7 Stat. 342, 343, 346-347. *See generally* F. Cohen, *Handbook of Federal Indian Law* 420 (1942). Few additional New York Indians moved to Wisconsin,

[4] Between 1795 and 1846, New York negotiated 25 additional treaties with the Oneidas, and by 1846, the Oneidas retained only a few hundred acres in New York (Supp. Pet. App. 14a).

however, and the pressures of white settlement were felt there as well. Accordingly, on January 15, 1838, the United States entered into the Treaty of Buffalo Creek with the New York Indians (7 Stat. 550 *et seq.*) to exchange their land in Wisconsin for a new reservation in the Indian Territory, in what is now Kansas. However, any New York Indians who already had moved to Wisconsin were permitted to remain there. Art. 1, 7 Stat. 551; Treaty of Feb. 7, 1838, United States-Oneidas at Green Bay, 7 Stat. 566 *et seq.*

Most of the New York Indians who remained in New York in 1838 did not remove to their new reservation in Kansas either. Several of the other New York Indian Nations thereafter succeeded in retaining or reacquiring rights to reservations in New York,[5] but the Oneidas did not. Approximately 320 of the Oneidas in New York instead moved to Canada. Most of the remaining Oneida lands in New York then were partitioned and sold pursuant to an 1843 state statute (1843 N.Y. Laws ch. 87). In 1846, 150 of the Oneida Indians who still were in New York moved to Wisconsin. By the turn of the century, of the Oneidas remaining in New York, approximately 150 were regarded as citizens of the State, and thus presumably had been integrated into the non-Indian population, while approximately 125 resided on the Onondaga Reservation. *New York Indians* v. *United States*, 40 Ct. Cl. 448, 452-455, 459-469, 468-472 (1905); Supp. Pet. App. 15a; H.R. Doc. 1590, 63d Cong., 3d Sess. 11 (1915). After virtually no New York Indians moved to the Indian Territory, the reservation set aside for them there was restored to the public domain and disposed of by the United States beginning in 1861. *New York Indians* v. *United States*, 170 U.S. at 12-13 n.1. The Wisconsin lands ceded by the New York Indians un-

[5] Treaty of May 20, 1842, United States-Seneca Nation, 7 Stat. 586 *et seq.*; *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1857) (Senecas); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867) (Senecas); *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 105-106, 121-122 n.18 (1960) (Tuscaroras); *New York Indians* v. *United States*, 170 U.S. at 13 n.1 (Tuscaroras).

der the Treaty of Buffalo Creek also were made part of the public domain and disposed of by the United States (id. at 12 n.1), but the land retained by the Oneidas in Wisconsin in 1838 remained in reservation status and formed the basis of the current Reservation for respondent Oneida Indian Nation of Wisconsin.

SUMMARY OF ARGUMENT

I

A. Petitioners' argument that the Tribes do not have a right to sue to enforce their asserted interest in the lands in suit is contrary to the Court's 1974 opinion in this case. Moreover, the legislative history of 25 U.S.C. 233 shows that Congress intended that Indians would be entitled to sue in federal court based on land and treaty claims in New York, and Congress manifested such an intent with respect to Indian land and treaty claims generally when it enacted 28 U.S.C. 1362. The Tribes also have a right of action directly under the Trade and Intercourse Act of 1793 and its successors. Those Acts afford special protection for Indian property rights, which are uniquely the domain of federal law, and they render an unauthorized sale of Indian lands invalid "in law or equity," a phrase that expressly contemplates civil litigation. Other provisions of the Trade and Intercourse Acts affirmatively support the right of Indians to sue. Nor is the Tribes' suit barred by principles governing the "federal common law" announced in *Milwaukee* v. *Illinois*, 451 U.S. 309 (1981).

B. The political question doctrine does not require dismissal, because the Constitution, the Trade and Intercourse Acts and federal treaties do not vest exclusive remedial authority in Congress or the President.

C. Federal law does not incorporate a state statute of limitations so as to bar the Tribes' suit. The Court has held that state limitations do not govern such suits (*Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922)), and Congress specifically so provided for New York claims when it enacted 25 U.S.C. 233. The appropriate limitations period in suits by Indians instead is that applicable

under 28 U.S.C. 2415 to suits by the United States on their behalf, since the underlying claim is the same in either case. Moreover, incorporation of a shorter limitations period from state law could be inconsistent with the text and legislative history of 28 U.S.C. 2415 and the Indian Claims Limitations Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 *et seq.*

D. The 1795 sale was not ratified by a federally approved Treaty in 1798 by which the Oneidas conveyed additional land to the State. The Trade and Intercourse Acts required that a purchase of Indian land must itself be "made" by federal treaty, not simply be referred to in a later treaty, and there is no indication that the President or the Senate considered the terms or fairness of the 1795 transaction, as those Acts contemplated. Moreover, the Treaty of Canandaigua of 1794 demonstrates that the federal government would explicitly confirm prior treaties with New York when it intended that result.

II

Although the court of appeals correctly disposed of the only issues petitioners present for review, this does not mean that the Tribes are entitled to take possession of all 100,000 acres covered by the 1795 transaction. Two other issues should be considered in any future litigation: (A) whether the Oneidas relinquished their claim in the Treaty of Buffalo Creek in 1838, which provided for the sale of their remaining land in New York and their complete removal to a new reservation in Kansas, and (B) whether equitable considerations should limit or bar relief in a suit by the Tribes.

ARGUMENT

The court of appeals in this case affirmed a judgment of $16,694 plus interest against petitioner Counties of Madison and Oneida, New York, for their use and occupation for two years of 841 of the 100,000 acres that were acquired by the State of New York from the Oneida Nation in 1795 without the approval of the federal government. Although suits against current landowners

based on eastern Indian land claims raise a broad range of sensitive and difficult issues of law and equity, the Counties and the State have presented only a few issues for review by this Court and have thereby given this case a rather narrow cast.

Petitioners concede, for example, that the Trade and Intercourse Act of 1793 applied to the land in question,[6] and they do not challenge the district court's holding that the 1795 transaction was invalid under that Act. They also do not challenge the respondent Oneida groups' current status as "tribes" that may now invoke the protection of the 1793 Act.[7] The judgment below likewise does not affect arguments raised in other cases that certain eastern Indian land claims were validly extinguished by special federal statutes or treaties.[8] Still other eastern claims have now been resolved by Congress without the need for a judicial determination.[9] And even as regards the 1795 transaction at issue here, petitioners have not presented in this Court two substantial questions they raised in district court: whether the Oneidas' claim was relinquished in the Treaty of Buffalo Creek, and whether relief is limited or barred by equitable factors. See Point II, *infra*. They instead have limited their objections to the judgment against the Counties to four other questions. As we now explain in Point I, however, it is our view that the court of appeals' disposition of those issues was clearly correct.

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[6] Compare *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612 (2d Cir. 1980), cert. denied, 452 U.S. 968 (1981).

[7] Compare *Maskpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979); *Maskpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), cert. denied, No. 83-624 (Dec. 12, 1983); *James* v. *Watt*, 716 F.2d 71 (1st Cir. 1983), cert. denied, No. 83-623 (May 21, 1984).

[8] See page 27 & note 26, *infra*; *Catawba Indian Tribe* v. *South Carolina*, 718 F.2d 1291 (1983), reh'g en banc granted, No. 82-1671 (4th Cir. argued June 4, 1984).

[9] Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.*; Maine Indian Claims Settlement Act, 25 U.S.C. 1721 *et seq.*

I. THE COURT OF APPEALS CORRECTLY REJECTED THE ONLY OBJECTIONS PETITIONERS RAISED TO THE JUDGMENT AGAINST THE COUNTIES

A. The Tribes Have A Cause Of Action Based On An Asserted Current Right Of Possession Under Federal Law

1. Petitioners' primary contention—that respondent Oneida Nations and Band (the Tribes) do not have a cause of action under federal law to assert a current possessory right to the 841 acres in suit (see Counties Br. 12-30; N.Y. Br. 10-30)—is in our view contrary to the thrust of the Court's 1974 decision in this very case. To be sure, the Court did not then identify the issue as whether the Tribes had a "cause of action." But it seemed to have been taken for granted that the federal laws and treaties cited *did* confer legally enforceable rights on the Tribes. The only unresolved issue appeared to be whether the Tribes' suit to enforce those rights was one "arising under" federal law in the first instance, so as to be within the jurisdiction of the district court under 28 U.S.C. 1331 and 1362, or whether the Tribes instead were required to enforce their federal rights in state court. See, *e.g.*, N.Y. Amicus Br. at 35-43, *Oneida*, *supra*. The Court held that the Tribes' suit arose under federal law, and it contemplated that on remand the district court could reach an "ultimate resolution of the federal issues on the merits." 414 U.S. at 667.[10]

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[10] The Counties object (Counties Br. 14, 15) that the court below found a cause of action specifically *for* damages. In its prior opinion in this case, however, the Court accepted the court of appeals' premise that "the case was essentially a possessory action" (414 U.S. at 666; see also *id.* at 677-679), and Justice Rehnquist also observed in his concurring opinion that "the complaint in this action is basically one in ejectment" (*id.* at 683). The award of "damages" may be viewed as an accounting for mesne profits, a traditional feature of a suit for ejectment or other possessory action. See, *e.g.*, *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 74-84 (1823); *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 344 (1941). Under the doctrine of *res judicata*, the Tribes' deliberate election (see Pet. Br. at 13, *Oneida*, *supra*) not to seek an order requiring the

The Court did not suggest in 1974 that the Tribes might have a federally protected right to possess the lands at issue and yet be unable to vindicate that right in court. To the contrary, the Court's opinion discussed numerous cases in which the existence and nature of Indian rights were litigated in ejectment, quiet title, or similar actions. See 414 U.S. at 668-674. Most of the cases cited involved a suit brought by the United States on behalf of Indians or a suit between non-Indians. But the Court did not suggest that Indians, unlike everyone else affected, would be precluded from suing to invoke Indian rights in the land—rights the Court acknowledged to be "'as sacred as the fee simple of whites.'" 414 U.S. at 668-669 (quoting *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835)). Indeed, the Court cited with approval (414 U.S. at 671) its prior decision in *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1857), in which the Court affirmed a state court judgment in favor of a New York Indian in a trespass action against a non-Indian intruder on Seneca lands that also were protected by the Treaty of Canandaigua. Cf. *Three Affiliated Tribes* v. *Wold Engineering*, No. 82-629 (May 29, 1984), slip op. 9.

Also significant is the emphasis the Court placed on the text and legislative history of 25 U.S.C. 233, which authorizes the State of New York to exercise civil jurisdiction in cases involving Indians. The final proviso to 25 U.S.C. 233 precludes the exercise of jurisdiction by New York courts "in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The Court observed that this proviso was intended to permit the Indians to "'go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto,'" because "'they certainly ought to have a right to have those claims properly adjudicated'" (414 U.S. at 681-682, quoting 96 Cong. Rec. 12460 (1950) (remarks of Rep. Morris)). In the Court's view, its holding that there is federal jurisdiction over the instant case was "in furtherance" of this congressional intent. 414 U.S. at 682.

Counties to quit the premises might bar them from seeking actual possession of the 841 acres in the future. See Restatement (Second) of Judgments § 18(1) (1982); *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 17-20. But this peculiar feature of the case does not detract from its essential nature as a possessory action.

2. The Court's apparent understanding in 1974 that the Tribes have a cause of action under federal law was well grounded in congressional intent and this Court's decisions generally. In 1966, Congress enacted 28 U.S.C. 1362 to grant the federal district courts jurisdiction over suits brought by recognized Indian tribes if "the matter in controversy arises under the Constitution, laws, or treaties of the United States." The legislative history makes clear that 28 U.S.C. 1362 was intended to assure a federal forum for Indians to litigate questions regarding their lands (H.R. Rep. 2040, 89th Cong., 2d Sess. 2 (1966)), including "actions to quiet title to land claimed by Indian tribes" (*id.* at 5) and "claims [that] arise under special treaties between the United States and the tribes" (S. Rep. 1507, 89th Cong., 2d Sess. 2 (1966)). Moreover, as this Court observed in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976), Section 1362 was intended "to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not brought." Accord *Arizona* v. *San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983), slip op. 12-13 n.10; *id.* at 1-2 (Marshall, J., dissenting); *id.* at 5-7 (Stevens, J., dissenting); H.R. Rep. 2040, *supra*, at 2-3.

It is clear, as the Counties and State concede (Counties Pr. 31-35; N.Y. Br. 25-26, 31-32 & n.*), that the United States could have brought the instant suit on behalf of the Oneidas to protect their treaty rights and to enforce the restraint on alienation contained in the Trade and Intercourse Acts. See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *United States* v. *Candelaria*, 271 U.S. 432, 441-444 (1926); *Heckman* v. *United States*,

224 U.S. 413, 437-440, 444-445 (1912). In light of the congressional purpose embodied in 28 U.S.C. 1362, it follows that the Tribes also have a right of action. It is irrelevant whether Indian tribes were thought to have the capacity to sue in 1793, because Congress clearly had the authority to remove any incapacity and allow them to enforce their legal rights. *Cf. Seneca Nation* v. *Christy*, 162 U.S. 283 (1896).

Recognition of a right of action by the Tribes in this case therefore is fully consistent with the repeated view of Congress and this Court that "the Indians are entitled 'to take their place as independent qualified members of the modern body politic[.]' *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369 (1968), *quoting Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943)," and that "the Indians' participation in litigation critical to their welfare should not be discouraged." *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 8 (footnote omitted). *See also Creek Nation* v. *United States*, 318 U.S. 629, 640 (1943). The ability of Indians to sue also lessens the federal government's substantial burden of reviewing and litigating individual claims on their behalf and ensures that the vindication of Indian rights in court is not entirely at the mercy of the government's litigation decisions, allocation of scarce resources, and competing considerations. *See Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968); *Cannon* v. *University of Chicago*, 441 U.S. 677, 706-708 & nn.41, 42 (1979); *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 16-17.

3. Petitioners ignore the express view of Congress and this Court that an Indian tribe may sue to protect its treaty and other property interests and argue instead (Counties Br. 12-24; N.Y. Br. 19-30) that the relevant question is whether a right of action by the Tribes should be "implied" under the Trade and Intercourse Acts. We disagree. Section 4 of the 1790 Act and its successors did not independently confer on Indians any property rights that they did not otherwise have. *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941). Those

Acts essentially protected Indian property rights derived from *other* sources—treaties, statutes, or aboriginal occupancy—by rendering any purported sale of those rights void in the absence of federal approval. The Tribes therefore did not have to cite the Trade and Intercourse Acts in their complaint; it was sufficient for them to cite the federal treaties on which they based their current right of possession. When the Counties defended against this claim by asserting that they have a superior right of possession deriving from the 1795 purchase, the Tribes could overcome that defense by invoking the directive in the Trade and Intercourse Acts that no such purchase is "of any validity in law or equity" in the absence of federal approval. If the Tribes' suit thus is viewed as one asserting a present right of possession under federal treaties that remain in force, Congress has made clear that a tribe has the right to sue to enforce such a right.

4. The result is no different, however, if the Tribes' suit is thought to arise directly under the Trade and Intercourse Acts. Contrary to petitioners' contentions (Counties Br. 12-24, 28-30; N.Y. Br. 18-25), the factors this Court identified in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), plainly support a right of action under those Acts, without regard to more recent congressional action. First, the protection of Indian rights is the domain of federal law; it is not "in an area basically the concern of the States" (*ibid.*). Second, the statutory invalidation of unauthorized land transactions was intended in substantial part for the "especial benefit" of the Indians. *Ibid.* (emphasis in original) (quoting *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916)). As this Court observed in *FPC* v. *Tuscarora Indian Nation*, *supra*, the "obvious purpose of the statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them" (361 U.S. at 119).[*] The fact that Con-

[*] *See also Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979); *United States* v. *Candelaria*, 271 U.S. at 441. *See also* 1 *American State Papers (Indian Affairs)*, *supra*, at 140-142 (President Washington's message to Cornplanter, Chief of the Senecas:

gress also hoped that the provision in turn would lead to peace on the frontier (see Counties Br. 10, 21-22, 24) does not detract from this special protective purpose.

Petitioners argue (Counties Br. 13-14; N.Y. Br. 15-17, 21), however, that the text of the Act does not support recognition of a right of action because Section 8 of the 1793 Act (1 Stat. 330) was a criminal statute. This argument is without merit. The second clause of Section 8, upon which petitioners rely, made it a criminal offense even to negotiate with Indians for the purchase of lands. That clause has no application in this case, because the Tribes do not base their claim on illegal *negotiations*. They claim that the resulting *sale* was illegal. The relevant portion of Section 8 as regards that claim is the first clause, which provided that "no purchase or grant of lands [] or * * * of title or claim thereto" from an Indian nation "shall be of any validity in law or equity" unless made pursuant to federal treaty. This is a statutory command that the transaction is void; it is not a criminal prohibition.[13]

Moreover, the language of the first clause—mandating the invalidity of an unauthorized transaction "in law or equity"—plainly contemplates civil litigation. At the very least it permits the invalidity of the transaction to be raised defensively in private litigation. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18

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the restriction is "the security for the remainder of your lands. * * * The General Government will never consent to your being defrauded, but it will protect you in all your just rights.").

[13] The Counties erroneously assert (Counties Br. 19) that the only defect in the 1795 transaction was that no United States commissioner was present at the signing of the Indenture between the Oneidas and the State. Section 8 of the 1793 Act explicitly declared invalid any sale of Indian land unless "made by a treaty or convention entered into pursuant to the constitution" (see 1 Stat. 330)—*i.e.*, by a federal treaty made or approved by the President with the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. *See FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 119. The proviso to the criminal prohibition in the second clause similarly stated that Indian claims "shall be extinguished by the treaty." The mere presence of a federal commissioner therefore would not have validated the sale.

(1979). But the legal consequences of voidness are typically not limited to countering claims made by an opposing litigant. Ordinarily, some form of affirmative relief also is available to the person for whose protection the statutory declaration of invalidity was intended. *Id.* at 18-19. In the context of a void conveyance of real property, a suit in ejectment would be an appropriate means to obtain that relief. As this Court observed in *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823), under the common law as it stood in 1789 and thereafter, "a right to land, by that law, include[d] the right to enter on it, when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it." Indeed, "[t]hat an action of ejectment could be maintained on an Indian right of occupancy and use, is not open to question." *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223, 232 (1850). Nothing in the language or legislative history of Section 8 of the 1793 Act suggests that Indians whose interests are directly at stake should be precluded from invoking that right.[14]

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[14] As the court of appeals observed (Pet. App. 23a n.13), the only indication in the background of the early Trade and Intercourse Acts is that suits by Indians were not precluded. In a message in December 1790, President Washington assured Cornplanter, Chief of the Senecas, that any treaty held without federal authority would not be binding. With respect to a particular past transaction, he stated that if the Senecas "have any just cause of complaint against [the purchaser], and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." 1 *American State Papers (Indian Affairs)*, *supra*, at 142-143.

If President Washington meant that the lower federal courts would be open to Indians, he apparently was mistaken (see Counties Br. 20-21 n.18). But the reference to "federal courts" was adequate to include the Supreme Court. Forty years before *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), he might have thought that an Indian tribe could bring an original action in this Court as a "foreign state." In addition, this Court could have reviewed a state court judgment in a suit by an Indian tribe if it concerned a treaty, the Trade and Intercourse Acts, or aboriginal rights. *Judiciary Act of 1789*, ch. 20, § 25, 1 Stat. 85. Moreover, even if we assume that President Washington was under a mistaken

Petitioners would infer such a preclusion from the presence of criminal sanctions and remedial measures in *other* sections of the 1793 Act. See Counties Br. 14-17, 18, 23; N.Y. Br. 15-17, 24-25. But most of the sections they cite dealt with wholly unrelated matters, such as the licensing of Indian traders (§§ 1-3, 1 Stat. 329), purchase of Indian horses (§ 6, 1 Stat. 330), and punishment of non-Indians who commit [redacted] crimes in Indian territory (§ 4, 1 Stat. 329). Petitioners therefore principally rely on Section 5 of the 1793 Act, which provided criminal sanctions for settlers on Indian lands and permitted the President to remove illegal settlers (1 Stat. 330). See 25 U.S.C. 180. With those remedies available, petitioners argue (Counties Br. 16, 23, 45-46; N.Y. Br. 16, 21, 24-25), there is no need to recognize a right in the Indians to bring their own suit against intruders. But it is commonplace in our legal order for landowners to have the right to bring a civil action even though trespass is a criminal offense (N.Y. Penal Law § 140.10 (McKinney Supp. 1983)) and law enforcement authorities may arrest and remove trespassers. See *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366, 368 (1859). There accordingly is no reason to believe that Congress would have viewed a trespass or ejectment action by an Indian tribe as inconsistent with the statutory scheme. Indeed, in *Fellows* v. *Blacksmith*, *supra*, this Court sustained a state court judgment in favor of an Indian in a trespass action against a non-Indian, even though the Trade and Intercourse Act of 1834 would have permitted prosecution or removal of the intruder.

In any event, a subsequent amendment makes clear that the provisions for prosecution and removal of settlers cannot be read to preclude Indians from suing to protect their property rights under the Trade and Intercourse Acts.[16] Section 22 of the 1834 Act (4 Stat. 733), now set forth at 25 U.S.C. 194, provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

This Section obviously contemplates that Indians may sue to obtain title to or possession of lands. Moreover, the Court stressed in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979), that this Section was part of the overall "design" of the Trade and Intercourse Acts "to protect the rights of Indians to their properties," specifically including provisions under which "non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions." These are the very features

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view of the jurisdiction of the lower federal courts, his observation at least indicates that the notion that an Indian tribe might sue was not as unthinkable as petitioners assert (Counties Br. 20-21 n.18; N.Y. Br. 18, 22).

[16] The Counties also rely (Counties Br. 18-20) on the presence of a provision in the 1796 Act that was carried forward in the 1799 Act but not in the 1802 and 1834 Acts. Section 5 of the 1796 Act (1 Stat. 470) provided that if any person made a settlement on lands belonging to or secured by treaty to an Indian tribe, he would forfeit to the United States all his right, title and claim to those lands. The Counties argue that the provision for forfeiture to the *United States* is inconsistent with a right of action by the tribe. The Counties misapprehended the purpose of the statutory provision.

As its legislative history makes clear, Section 5 of the 1796 Act was directed at persons who had acquired the right of preemption to Indian lands—*i.e.*, who had purchased the lands from the State subject to the unextinguished right of Indian occupancy (see note 18, *infra*)—and then entered onto the lands without waiting for the Indian title to be extinguished. See 5 Annals of Cong. 804-805 (1796) (remarks of Rep. Holland); *id.* at 807 (remarks of Reps. Cooper and Craik); *id.* at 808-809 (remarks of Rep. Hillhouse). The right that was to be forfeited to the United States under Section 5 accordingly was the intruder's right of preemption or claim to the underlying fee, not any interest purchased from the Indians. Nor was any special provision required for forfeiture of an interest acquired from the Indians, because Section 12 of the 1796 Act (1 Stat. 472) separately rendered such purchases invalid. But even if a right of occupancy illegally acquired from the Indians also was within the reach of Section 5 of the 1796 Act, that right

of Section 5 of the 1793 Act that petitioners argue are inconsistent with suits by Indians to enforce their rights under Section 8 of that Act. Petitioners' implied preclusion argument therefore is without merit.

5. Finally, petitioners object (Counties Br. 25-30; N.Y. Br. 11-19) to the court of appeals' recognition of a cause of action under the federal common law (Pet. App. 9a-13a). We must admit to considerable doubt about the utility of analyzing this case by reference to "federal common law" principles in other settings. This is not an instance in which a federal court has been asked for the first time to fashion a substantive rule of decision or standard of conduct, as in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), upon which petitioners rely. In its prior decision in this case, the Court characterized the principles that Indians' possessory interests may be extinguished only by the federal government and that Indian land transactions are void in the absence of federal consent as "rudimentary propositions" (414 U.S. at 670) derived from federal supremacy in Indian affairs under the Constitution and parallel sovereign prerogatives under the Articles of Confederation and the colonial regimes. *Id.* at 667-670.[18]

Nor was this constitutionally-based "federal common law" supplanted by Section 4 of the Trade and Intercourse Act of 1790 or its successors. Those Acts simply "put in statutory form" the rule that obtained even in the absence of a statute. *Oneida*, 414 U.S. at 678. Moreover, this Court repeatedly has enforced the principles pertaining to Indian property without pausing to decide whether their ultimate source is the Constitution, stat-

presumably would have been restored to the Indians upon its forfeiture to the United States. The controversial addition of the forfeiture provision in 1796 and its unexplained deletion in 1802 therefore do not in the least undermine the right of the Tribes to sue.

[18] On September 22, 1783, the Continental Congress adopted a proclamation prohibiting the purchase or receipt of any gift or cession of Indian lands without the express authority of Congress and providing that any such transaction "is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession or settlement." 25 *Journals of the Conti-*

tion, treaties, or a species of "common law" inhering in the nature of federal sovereignty and the course of dealing with Indians. For those reasons, we believe it is essentially irrelevant whether this case is thought to arise under the "federal common law" or the Trade and Intercourse Acts. Since the governing rules are settled, the only remaining function for a court under either view is to consider possible defenses in a possessory action brought to vindicate those principles and the nature of appropriate relief. "[A]bsent federal statutory guidance, the governing rule[s] of decision would be fashioned by the federal court in the mode of the common law." *Oneida*, 414 U.S. at 675. This is a traditional role for the courts in fleshing out the details of a cause of action Congress has created or endorsed. *See, e.g., Transamerica*, 444 U.S. at 18-19.

B. The Tribes' Claim Does Not Present Solely Non-Justiciable Political Questions

Although the Tribes' right to sue is clear, the Counties assert that this case presents non-justiciable political questions. They first contend that there has been "'a textually demonstrable constitutional commitment of the issue to a coordinate political department'" (Counties Br. 45-46, quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)) because Section 5 of the 1793 Act delegated exclusive remedial discretion to the President. As we have shown, however, Section 5 does not preclude this suit. *See* pages 16-18, *supra*. In any event, that is a question of statutory construction, not a "political question."[19]

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nental Congress 1774-1789, at 688 (1922). The identical principle under European rule is discussed in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-597 (1823). A number of the States had similar rules. *See, e.g.*, *id.* at 555; *Lattimer* v. *Poteet*, 39 U.S. (14 Pet.) 4, 14 (1840).

[19] For similar reasons, petitioners are in contending (Counties Br. 46; N.Y. Br. 25-28) that Article VII of the Treaty of Canandaigua renders this case non-justiciable. Under Article VII, the United States and the Six Nations agreed that "private revenge" would not be taken for injuries done by individuals on either side, but that complaint instead should be made to the other side. 7 Stat. 46. A public lawsuit can scarcely be thought to be "private

For similar reasons, the Counties also err in arguing that there is "'an unusual need for unquestioning adherence to a political decision already made'" (Counties Br. 45, 47-48 (quoting *Baker* v. *Carr*, 369 U.S. at 217); see also N.Y. Br. 29)—namely, the 1967 decision by the Secretary of the Interior not to sue on the Tribes' behalf because of the pendency of the Tribes' claim against the United States under the Indian Claims Commission Act of 1946 (25 U.S.C. (1976 ed.) 70 *et seq.*) based on the same transaction. See J.A. 42a-44a.[17] Indeed, Congress enacted 28 U.S.C. 1362 to provide Indian tribes with a federal forum especially when, as in 1967, the United States' decision not to sue might be attributable in part to a conflict of interest. See page 11, *supra*. Cf. Memo for the U.S. as Amicus Curiae at 10, *Oneida*, *supra*.[18]

C. The Tribes' Suit Is Not Barred By The Statute Of Limitations

Petitioners also contend (Counties Br. 31-35; N.Y. Br. 30-32) that the Tribes' suit is time-barred because the ten-year statute of limitations under New York law for

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remedies." Moreover, Article VII provides that Congress may "make other equitable provision for the purpose" of remedying injuries, and Congress clearly has now permitted Indians to sue. *Ibid.*

[17] The Counties have withdrawn their claim against the United States and therefore are not precluded by the doctrine of res judicata or collateral estoppel from seeking to recover land or damages from other parties. Cf. *United States* v. *Dann*, cert. granted, No. 83-1478 (May 29, 1984).

[18] The Counties speculate (Counties Br. 47-48) that disagreements among the three Oneida respondents could create difficulties in deciding who should share in the judgment. If the Tribes do not agree among themselves, however, this aspect could be decided by the district court or Congress could enact appropriate legislation. *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977). In any event, it is not clear why this disagreement among the plaintiffs renders their cause against the Counties non-justiciable. The State notes (N.Y. Br. 29) the potential for the judgment below to unsettle titles of thousands of current residents in the 100,000-acre area. However, a similar potential has not rendered other claims based on Indian title non-justiciable. See, *e.g.*, *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) at 600; *Cherokee* v. *Georgia*, 57 U.S. (16 How.) 282, 288 (1853); *Foley* v. *Pettrick*, 148 U.S. 317 (1893).

actions to recover real property (N.Y. Civ. Prac. Law § 212 (McKinney 1972)) should be incorporated into federal law.[19] This argument is inconsistent with this Court's decisions and the intent of Congress.

1. Unless Congress otherwise provides, the United States is not barred by any statute of limitations or laches in a suit to enforce a public right or assert a public interest. *United States* v. *Beebe*, 127 U.S. 338, 344 (1888). See also *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). These principles apply equally to suits brought by the United States on behalf of Indians. *Nevada* v. *United States*, slip op. 30; *Board of Commissioners* v. *United States*, 308 U.S. 343, 351 (1939); *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926). Consistent with these holdings, the Court also has held that a state statute of limitations is inapplicable in a suit brought by an Indian to set aside a conveyance made in violation of a federal statutory prohibition. *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922). Petitioners offer no reason to depart from *Ewert* v. *Bluejacket*, and Congress clearly intends no such departure.

The final proviso to 25 U.S.C. 233, upon which this Court relied in its prior *Oneida* opinion (414 U.S. at 680-682), states that nothing in Section 233 shall be construed as "making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The legislative history establishes that this language was specifically intended to assure that the New York statute

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[19] We do not agree with the Counties' submission (Counties Br. 35-38) that any cause of action under the Trade and Intercourse Act of 1793 abated upon the expiration of the 1793 Act or its successors, the 1796 and 1799 Acts. The substance of the provision invalidating unauthorized transactions predated the 1793 Act and has remained in effect to this day. Congress could not have intended that the expiration of one in an unbroken series of such prohibitions would effectively render valid what theretofore had been void. Compare *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 313 (1964).

of limitations would not apply to pre-1952 land claims (96 Cong. Rec. 12460 (1950) (remarks of Rep. Morris)):

> As it is now, the Indians, as we know, are wards of the Government and, therefore, the statute of limitations does not run against them as it does in the ordinary case. This will preserve their rights so that the statute will not be running against them concerning those claims that might have arisen before the passage of this act.

Application of the state statute of limitations here therefore would be inconsistent with the clear intent of Congress.

For two reasons, the applicable rule in suits by Indian tribes instead should be derived from 28 U.S.C. 2415, which establishes the statute of limitations for suits brought by the United States on behalf of Indians.[20] First, because the same underlying claim is involved whether the suit is brought by the United States or the Tribe, "the similarity of the rights asserted in the two contexts" alone suggests that the same limitations period should govern both. *DelCostello* v. *Teamsters*, No. 81-2386 (June 8, 1983), slip op. 18. This conclusion also is consistent with the congressional policy embodied in 28 U.S.C. 1362. Second, there ordinarily is close coordination between the United States and the tribes in evaluating a claim for possible litigation. Applying the limitations period in 28 U.S.C. 2415 to suits by tribes would discourage premature suits by Indians when an evaluation by federal officials in consultation with the Indians might reveal that the claim lacks merit or warrants settlement. *See*, e.g., S. Rep. 96-569, 96th Cong., 2d Sess. 5 (1980). Cf. *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 367-371 (1977). By the same token, application of a shorter state limitations period to suits by Indians would not accomplish the goal of repose, because the United States would retain the right to sue on the same claim. The practicalities of the situation and the

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[20] Accord *Capitan Grande Band of Mission Indians* v. *Helix Irrigation Dist.*, 514 F.2d 468, 470-471 (9th Cir.), cert. denied, 423 U.S. 874 (1975); *cf.* 80 Interior Dec. 220 (1973).

need for uniformity therefore also indicate that the limitations period for suits by the United States and Indians should be the same. *DelCostello*, slip op. 10, 19; *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958).

2. In any event, the text and background of 28 U.S.C. 2415 and the Indian Claims Limitations Act of 1982 (Pub. L. No. 97-394, 96 Stat. 1976 *et seq.*) confirm that they also should govern in suits brought by the Indians themselves. Sections 2415(a) and (b), which apply to tort and contract suits by the United States generally, contain a separate limitations period of six years and 90 days for such suits brought on behalf of Indians. Section 2415(c) in turn excludes from these limitations all actions "to establish the title to, or right of possession of, real or personal property." Contract and tort claims that accrued prior to the July 18, 1966 effective date of Section 2415 were deemed to have accrued on that date. 28 U.S.C. 2415(g). As the period for pre-1966 Indian claims was about to expire in 1972, Congress became concerned that many older Indian claims would be lost. H.R. Rep. 92-1267, 92d Cong., 2d Sess. 3-6 (1972); S. Rep. 92-1253, 92d Cong., 2d Sess. 2-5 (1972). Congress therefore extended the limitations period for damage claims on behalf of Indians to 1977, and later to 1980 and 1982. Pub. L. No. 92-485, 86 Stat. 803; Pub. L. No. 95-64, 91 Stat. 268; Pub. L. No. 95-103, 91 Stat. 842; Pub. L. No. 96-217, § 1, 94 Stat. 126.

Finally, in the Indian Claims Limitations Act of 1982 Congress established a procedure to bring these older claims to a close. Congress directed the Secretary to publish a list of all outstanding pre-1966 claims in the *Federal Register*, to provide the Indians an opportunity to propose additional claims, and then to publish a final list of additional pre-1966 claims that were to be preserved. The two lists were published on March 31 and November 7, 1983, respectively (48 Fed. Reg. 13698, 51204), and the Oneidas' claim is contained on them (*id.* at 13920). Accordingly, as petitioners concede (Counties Br. 32, 34, 35; N.Y. Br. 31-32), the United States is not barred from bringing a damage action on the Oneidas'

behalf.[23]

Section 5(b) of the Indian Claims Limitations Act (96 Stat. 1978) requires the Secretary to notify and furnish relevant evidence to the tribe affected if he decides in the future to reject any of the listed pre-1966 claims for litigation. Conspicuously, Section 5(c) then provides that "any right of action"—not simply a right of action by the United States—"shall be barred" unless the complaint is filed within one year of the Secretary's rejection of the claim or within three years of his transmittal to Congress of a proposed legislative resolution of it. 96 Stat. 1978; accord 28 U.S.C. 2415(a) and (b) (final proviso). The obvious purpose of this procedure is to furnish formal notification to the affected Indians whenever the Secretary has decided not to file suit on their behalf and to allow them a reasonable opportunity to file their own suit. See H.R. Rep. 97-954, 97th Cong., 2d Sess. 9 (1982). Compare 42 U.S.C. 2000e-5(f)(1) (right to sue letter under Title VII). Application of a shorter state limitations period would frustrate this scheme.

Moreover, the Senate report on the 1980 extension of the limitations period for pre-1966 damages claims explicitly states—with reference to 28 U.S.C. 2145(c)—that "[t]he statute of limitations does not bar an Indian tribe, band, group, an individual Indian, or the United States acting on their behalf from bringing a claim for title to lands." S. Rep. 96-569, *supra*, at 4. This clearly reflects a congressional intent that a tribal possessory action such as that involved here is *not* barred by a statute of limitations. The statements in the legislative history upon which petitioners rely (Counties Br. 32-33; N.Y. Br. 31 n.*) in arguing that 28 U.S.C. 2415 is inapplicable to suits by Indians all suggest that the Indians might not be barred from suing for damages even *after* the United States is time-barred under 28 U.S.C.

[23] Under 28 U.S.C. 2415(a) and (b), any action by the United States on behalf of an Indian tribe for money damages based on a claim that is not included on the Secretary's lists now is barred unless it was filed within 60 days after publication of the second list on November 7, 1983.

2415(a) and (b).[24] See also S. Rep. 96-569, *supra*, at 4; H.R. Conf. Rep. 96-843, 96th Cong., 2d Sess. 3 (1980). In our view, those observations, all of which were made in 1980 or earlier, are no longer accurate, because Congress clearly indicated in 1982 that suits by Indians should be governed by 28 U.S.C. 2415 and the Indian Claims Limitations Act. But however that may be, the passages upon which petitioners rely obviously do not suggest that a *shorter* limitations period drawn from state law should govern. The legislative history also establishes that the extensions of the statute of limitations were intended to preserve damage actions based on eastern Indian land claims, including those of the Oneidas.[25] That congressional intent should control here.

D. The 1795 Transaction Was Not Ratified By Federally Approved Treaties In 1795 and 1802

Petitioners' final contention—and their only contention on the merits—is that the 1795 transaction, even

[24] See 126 Cong. Rec. 3289 (1980) (remarks of Sen. Melcher); *id.* at 3290 (remarks of Sen. Cohen); *id.* at 8745 (remarks of Rep. Clausen); *id.* at 8747 (remarks of Reps. Marlenee and Danielson); 123 Cong. Rec. 22166, 22499 (1977) (remarks of Rep. Cohen); *id.* at 22168, 22507 (remarks of Rep. Dicks); *id.* at 22500 (remarks of Rep. Foley); *id.* at 22509 (remarks of Rep. Studds); *id.* at 22510 (remarks of Rep. Yates); *Statute of Limitations Extension: Hearing Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 1st Sess. 11, 312-314 (1979); *Statute of Limitations Extension for Indian Claims: Hearings on S. 1377 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 76-77 (1977); *Time Extension for Commencing Actions on Behalf of Indians: Hearing on S. 1377 and H.R. 10121 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. 23 (1972). But *cf. id.* at 19.

[25] See, *e.g.*, H.R. Rep. 96-807, 96th Cong., 2d Sess. 9 (1980); S. Rep. 96-569, *supra*, at 3, 10-12; H.R. Rep. 95-256, 95th Cong., 1st Sess. 5 (1977); 126 Cong. Rec. 3288 (1980) (remarks of Sen. Cohen); *id.* at 8745 (remarks of Rep. Danielson); *id.* at 8746 (remarks of Rep. Mitchell); *id.* at 8748 (remarks of Rep. Holland); *id.* at 8749 (remarks of Rep. Sawyer); *id.* at 8749-8750 (remarks of Rep. Hanley); 123 Cong. Rec. 22165 (1977) (remarks of Rep. Danielson); *id.* at 22165-22166 (remarks of Rep. Cohen); *id.* at 22168 (remarks of Rep. Walsh); *1979 Hearings*, *supra* note 22, at 15-16, 313-315.

though concededly invalid when made, was ratified by federally approved treaties in 1788 and 1802 in which the Oneidas ceded additional land to the State. See County Br. 39-44; N.Y. Br. 32-36. Only the 1788 Treaty has ever been regarded as effective, however,[24] and any ratification argument therefore must be confined to the 1788 treaty.

This Court has held that congressional intent to extinguish Indian title must be "clear," "plain" and "unambiguous," and will not be "lightly implied," in view of the "avowed solicitude of the Federal Government for the welfare of its Indian wards" (*United States* v. *Santa Fe Pacific R.R.*, 314 U.S. at 346, 353-354). Petitioners have pointed to no evidence, much less plain and unambiguous expressions, that approval of the 1788 Treaty by the President and the Senate actually was intended by them to constitute affirmative approval of the 1795 transaction. Petitioners' entire ratification argument instead is based on two passages in the notes and bounds description of the lands ceded by the Oneidas in 1788 that refer to a lot in the "last purchase" from the Oneidas. These passing references to the 1795 purchase are insufficient to constitute a ratification of that purchase.

First, the Trade and Intercourse Acts of 1793 and 1796 provided that no purchase of Indian lands would be of any validity unless "made by treaty or convention entered into pursuant to the constitution" (§ 8, 1 Stat. 330;

[24] The 1788 and 1802 Treaties both were approved by the Senate (1 *Journal of the Executive Proceedings of the Senate of the United States* 312 (1789); *id.* at 428 (1802)), but neither is printed in Volume 7 of the Statutes at Large, which was intended to be a compilation of "all treaties with * * * Indian tribes." See 2 Ess. 10, 1 Stat. 739. However, there is evidence that President Adams approved the 1788 Treaty (*John Adams' Journal of Executive Acts—March 1797-March 1799* (entry dated Feb. 22, 1799), *reproduced in Adams Family Papers, John Adams Misc.* (Lib. Cong. Reel No. 194)), and that Treaty is included in a list compiled by the President in 1822 of Indian treaties that extinguished Indian title in New York (H.R. Doc. 74, 17th Cong., 1st Sess. 8 (1822)). Accordingly, the 1788 Treaty would appear to be valid. We are unaware, however, of any comparable indication that the 1802 Treaty was approved by the President or regarded as being in force.

§ 12, 1 Stat. 472). A mere reference to the 1795 purchase in a subsequent treaty does not satisfy the statutory requirement that the purchase itself be "made" by a federal treaty or manifest the formal and considered federal approval Congress intended.[25] Second, there is no indication that the President or the Senate had before them in 1788 either the 1795 indenture or a report by a responsible federal official explaining its terms and recommending its approval. Because the Trade and Intercourse Acts were intended to prevent unfair dispositions of Indian land, we cannot assume that the President and the Senate would approve the transaction in the absence of such information, especially in light of the Executive's prior opposition to the State's negotiating with the Oneidas for the 1795 purchase (see page 4, *supra*).

Third, in the Treaty of Canandaigua of 1794 just four years earlier, the federal government demonstrated that it knew how to ratify prior transactions with New York when it wished to do so. In Article II of that Treaty, the United States explicitly "acknowledge[d]" the lands reserved to the Oneidas "in their * * * treaties with the state of New-York * * * to be their property" and agreed to protect the Oneidas in their possession in return for the Oneidas' promise not to claim other lands. 7 Stat. 45.[26] Compare *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 602-604 (1823). The passing references to the 1795 transaction in the 1788 Treaty are exceedingly casual by comparison and cannot be thought to manifest

[25] The 1788 Treaty was essentially a deed by which the Oneidas conveyed the land described to the State, and the language employed therefore does not imply an intent by the President and Senate to approve some other transaction. This is not a case in which language employed by Congress itself in passing a later law is said to reflect an affirmative congressional intent to approve a prior transaction. See, *e.g.*, *Seneca Nation* v. *United States*, 173 Ct. Cl. 912, 913 (1965).

[26] The Tribes contend in separate litigation that this language in the 1794 Treaty does not extinguish their claims to the lands ceded to New York in 1788. *See Oneida Indian Nation* v. *New York*, 691 F.2d 1070, 1086-1087 (2d Cir. 1982). We do not support that argument.

an equivalent expression of intent by the President and Senate to extinguish Indian claims. Nor is there any indication that the 1795 transaction was thereafter regarded as having received the requisite federal approval. Significantly, for example, the land ceded under it was not listed in the President's 1822 compilation of New York lands to which Indian title had been extinguished. See H.R. Doc. 74, 17th Cong., 1st Sess. 7-8 (1822).

II. ADDITIONAL CONSIDERATIONS NOT RAISED BY PETITIONERS MIGHT BAR RECOVERY OR LIMIT RELIEF IN OTHER CASES

As we have explained in Point I, the court of appeals' disposition of the only four issues the Counties have presented for review by this Court was clearly correct. For this reason, we are constrained to conclude that the judgment of the court of appeals should be affirmed insofar as it sustains the district court's judgment for the Tribes against the Counties.[27]

There can be no blinking the fact, however, that the award of a money judgment for wrongful occupation of land that the Oneida Nation itself sold 190 years ago is, as the Counties put it, "extraordinary." Counties Br. 9. And because the money judgment is premised on the con-

[27] We do not address the question whether the Counties have a claim for indemnity against the State and whether any such claim is barred by sovereign immunity. It is clear that the United States would not be barred from bringing an action directly against a State to recover land it acquired in violation of the Trade and Intercourse Acts and to recover mesne profits owing as a result of the unauthorized occupation of the land. *United States* v. *Minnesota*, 270 U.S. 181, 193-196 (1926). In light of Congress's intent in enacting 28 U.S.C. 1362, an Indian tribe probably also is not barred by sovereign immunity from bringing such an action against a State. *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. at 472-475. Cf. *Arizona* v. *California*, slip op. 7 ("[a]ssuming *arguendo*" that sovereign immunity would bar a suit by a tribe against a State). This view is reinforced by the specific intent of Congress in enacting the Trade and Intercourse Acts to invalidate unauthorized State purchases because of prior overreachings. However, because the Tribes did not bring an action directly against the State, there is no occasion to consider the application of sovereign immunity principles in such a setting.

clusion that the Tribes have a current right to possess the 841 acres in suit (but see note 10, *supra*), affirmance of the judgment below could be understood to imply that the Tribes have the right to take possession of all 100,000 acres involved in the 1795 transaction from the thousands of residents and businesses that now occupy the land (although it presumably would not call into question the validity of the current owners' underlying fee interest).[28] But, in our view, that is not the necessary consequence of the decision below.

As an initial matter, what the court of appeals held is that the Tribes retain a right to occupy the 841 acres. Congress has the power to extinguish that right at any time, with or without compensation, simply by ratifying the 1795 transaction. For this reason, the decision below, however "extraordinary," is nonetheless consistent with the established principle that Indian title is "protected by the political power" (*Clark* v. *Smith*, 38 U.S. (13 Pet.) 195, 201 (1839)) and is to be "respected by all courts until it be legitimately extinguished" (*Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810)). Congress has enacted legislation to extinguish Indian title and claims related thereto in other eastern States (see note

[28] The State owned the underlying fee in the land occupied by Indians in the Eighteenth Century. *Oneida*, 414 U.S. at 670. In the 1788 Treaty with New York, the Oneidas ceded their lands (*i.e.*, their right to occupy the lands) to the State; there was "reserved" from that cession some 300,000 acres, which had the effect of preserving the Oneidas' right to occupy those lands. If, as appears, the State therefore retained its ownership of the underlying fee to those 300,000 acres after 1788, it was free to make encumbered grants of the 100,000 acres involved in the 1795 purchase from the Oneidas even before that transaction and without regard to its validity. Not, of course, the Indian right of occupancy subsisted until extinguished by the federal government. See *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810). For these reasons, the Counties' assertion (Counties Br. 10) that "thousands of titles" to land in the 100,000-acre area have been "declared useless scraps of paper" is incorrect. The State presumably is required to respect the prior grants of the fee to those lands and the current titles based on those grants. When the Oneidas' right of occupancy is extinguished, the owners would have a complete fee interest in the land.

9, *supra*), and it could be expected to do the same in New York should the occasion arise. Nor is the reach of the decision below limited by the prerogatives of Congress alone. There are at least two other considerations that petitioners have not presented for review by this Court but which might limit or even bar relief in future cases.

A. In *Santa Fe*, the Walapais Indians had requested that a reservation be created for them because white settlers had entered onto their traditional domain, and such a reservation was established by Executive Order. The Court explained the consequences of this arrangement (314 U.S. at 350):

> In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. * * * Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.

The question arises whether the Oneidas might not have made a similar relinquishment in the Treaty of Buffalo Creek of 1838.

The New York Indians formally accepted and urged ratification of the United States' Treaty with the Menominees that secured land for them in Wisconsin, concluding that the land provided was sufficient "to answer all the wants of the New York Indians" (7 Stat. 499 App.). In the Treaty of Buffalo Creek of 1838, the New York Indians ceded all of those Wisconsin lands—except for a small portion occupied by the New York Indians (principally Oneidas) who had moved to Wisconsin (Art. 1, 7 Stat. 551)—in exchange for a new reservation in the Indian Territory. The Preamble to the 1838 Treaty

recites that the New York Indians had "applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian Territory." 7 Stat. 550.

"[T]he agreement of the Indians to remove beyond the Mississippi" was "[p]robably * * * the main inducement" for the United States to set aside the new reservation in the Indian Territory (*New York Indians* v. *United States*, 170 U.S. at 15), and the Treaty obviously contemplated their complete removal from New York. The new reservation was described in the Treaty as "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes" (Art. 2, 7 Stat. 551 (emphasis added)).[*] Moreover, the Treaty itself provided for the disposition of all of the Indians' remaining land in New York. In Article 10, the Senecas sold their four reservations in New York to non-Indians who had purchased the right of preemption (7 Stat. 553). *See also* Art. 14, 7 Stat. 554 (disposing of Tuscaroras' land). Similarly, the Oneidas residing in New York "agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. 554.

"These proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts sets apart for them in Kansas." *New York Indians* v. *United States*, 170 U.S. at 21. A court might well conclude that it "cannot now be fairly implied" (*Santa Fe*, 314 U.S. at 350) that the Indians nevertheless were to retain a claim to *other* lands in New York that they no longer even occupied in 1838. Accordingly,

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[*] Similarly, the new reservation was of sufficient size to furnish 320 acres for each of the New York Indians in Wisconsin and New York who had been enumerated in a census appended to the Treaty. Art. 2, 7 Stat. 551; 7 Stat. 556 (Sched. A).

their request for and acceptance of a new reservation might "be regarded in law as the equivalent of a release" and "relinquishment" of any tribal rights they had in the lands they no longer occupied in New York. *Ibid.* Those lands not only were "notoriously claimed by others" (*ibid.*)—the white settlers who had moved into the area by 1838; they had been sold by the Oneidas themselves for disposition to white settlers. It is true that few New York Indians actually moved to their new reservation in Kansas. But the Court in *Sante Fe* found a relinquishment even though many Walapais likewise did not move to their new reservation and it was of little value to them for a considerable period. 314 U.S. at 337.

It might be argued that the Treaty of Buffalo Creek and any relinquishment it embodied were effectively rendered void when the New York Indians did not remove to Kansas. But subsequent events cast some doubt on that argument as well. In 1898, Congress passed a special jurisdictional statute (Act of Jan. 20, 1898, ch. 32, 27 Stat. 426 *et seq.*) permitting the New York Indians to seek compensation for the Kansas lands. The Court of Claims in fact held that the 1838 Treaty had failed because the Indians were not removed from New York to Kansas, and it denied recovery on that basis. *New York Indians* v. *United States*, 30 Ct. Cl. 413, 459-460 (1895). But this Court reversed. It held that the 1838 Treaty vested title to the Kansas reservation in the New York Indians and that the Indians had not forfeited their rights under the Treaty by failing to move there. *New York Indians* v. *United States*, 170 U.S. at 14-21, 24-25, 29-33. The Court accordingly held that the Indians were entitled to a money judgment for the amount the United States received when it sold the Kansas land to settlers. 170 U.S. 614 (1898). That award was divided among all of the New York Indians, including the Oneidas in Wisconsin and New York and those who moved to Canada in the 1840's. *See New York Indians* v. *United States*, 40 Ct. Cl. at 459-461, 469-472. Because each of the constituent Oneida groups successfully sued to enforce its rights under a treaty that was intended "to release the Eastern

land from Indian tenure" (30 Ct. Cl. at 459), a court might conclude that the Oneidas should not now be heard to contend that much of New York was not released from Indian tenure after all. Cf. *United States* v. *Dann*, cert. granted, No. 83-1476 (May 29, 1984).[*]

We have not, however, reached a concluded view on the relinquishment question. That would require further examination of the circumstances surrounding the Treaty of Buffalo Creek and subsequent events, including the Indians' understanding of the transaction (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-676 (1979)) and the relevance, if any, of the United States' acknowledgment in the Treaty of Canandaigua of the Oneidas' interest in the land.

B. A question remains whether equitable considerations should limit the relief available to the present-day Oneida groups. The Counties interposed such an objection in district court (Supp. Pet. App. 27a-30a), but they do not appear to have presented it on appeal and they have not presented it for review by this Court. Some consideration of the question is nevertheless appropriate, in our view, in order to illuminate the context in which the issues that are before the Court might be resolved in future cases.

Here, as in *Board of Commissioners* v. *United States*, 308 U.S. 343, 349 (1939) (a suit to recover taxes improperly levied on Indian land), Congress has not specifically provided for "the nature and extent of relief in case loss is suffered"—in this case, the loss resulting from a void conveyance or wrongful occupation of Indian land. Congress instead has "left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature" (*id.* at 351). Even in

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[*] The legislative history of the special jurisdictional statute also reflects an understanding that the New York Indians "gave up the New York lands." 31 Cong. Rec. 668 (1898) (remarks of Sens. Hiscock and Platt); *id.* at 708 (same).

suits brought by the United States, then, Congress may be thought to have left the courts free, when fashioning a remedy, to "take into account appropriate considerations of 'public convenience'" (*ibid.*); to give "due regard for local institutions and local interests" (*ibid.*); and to weigh such factors as "unexcused delay," "considerations of fairness," and the relative innocence of the defendant (*id.* at 332-333). But there is no need to consider at this time whether *or* to what extent these principles apply in suits brought by the United States to set aside a void conveyance of tribal land. This is so because, in our view, such principles plainly *do* apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest in enforcing the prohibitions against unauthorized purchases of tribal land[34] and the tribe itself has sued to repudiate its own prior transaction and assert its own possessory rights. Cf. *United States* v. *Holland*, 322 U.S. 303, 308 (1944).

Equity might inform the court's judgment in a variety of ways. Under settled doctrine, for example, equitable considerations could have a direct bearing on the court's award of money damages for past use and occupation of the land. In our view, the award of money damages in a case such as this should be regarded as the "familiar remed[y] equitable in [its] nature" *(Board of Commissioners*, 308 U.S. at 331), of requiring an accounting for mesne profits ancillary to a possessory action. *See* note 33, *supra*. Ordinarily, the plaintiff in such an action is entitled to recover profits and rents from the time his

[34] The Trade and Intercourse Acts can be said to have established a guardian-ward relationship between the United States and the Indians in a moral or political sense, growing out of the extended federal oversight of Indian land transactions. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 72. But we do not believe that those Acts were understood to establish a "trust" relationship in a legal sense that would compel the United States to sue to set aside any conveyance made without the approval of the federal government. *Compare United States* v. *Mitchell*, 445 U.S. 535, 539-540 (1980). *Cf. Nevada* v. *United States*, slip op. 10-17; *but cf. Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975).

title accrued, subject to any applicable statute of limitations. But an award of mesne profits may be limited even where, as here, recovery is not barred by the statute of limitations (see pages 20-25, *supra*), if there are countervailing equitable factors, such as an absence of notice to the defendant of the plaintiff's adverse claim or laches by the plaintiff in asserting it. In that event, an accounting for mesne profits might be confined to the period *after* the plaintiff filed suit. *See, e.g., Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 78-85 (1823).[35]

It therefore might have been argued in this case that the Tribes were not entitled to any monetary recovery from the Counties for the years 1968 and 1969—the two years *prior* to the filing of the complaint—if the Counties did not have notice of the Tribes' adverse claim or if the Tribes were deemed guilty of laches in pursuing it. Although the Counties have not challenged the judgment against them on this ground, an award of monetary relief might be limited or barred on this ground in any future case against private landowners. *Cf. Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. at 373.[36] More-

[35] In addition, in accounting for mesne profits, a bona fide occupant of the land is permitted to offset the value of improvements, as the court of appeals held in this suit (Pet. App. 34a). *See Green* v. *Biddle*, 21 U.S. (8 Wheat.) at 81-85.

[36] Other landowners in the 100,000-acre area of course now have generalized "notice" of the Tribes' adverse claim by virtue of whatever publicity has surrounded this suit against the Counties. However, the Tribes deliberately refrained from suing private landowners, perhaps because they expect a legislative resolution or for some other reason do not desire or anticipate that private landowners will actually be removed from their land or be made to answer in damages. A court might conclude in these circumstances that the liability of other landowners for mesne profits should not begin to run at least until they have personally been sued by the Tribes, because it would be unrealistic to expect them to vacate their premises in the face of an adverse claim that the Tribes have hesitated to press and unfair for the Tribes to refrain from suing and yet demand that the monetary liability of the landowners accrue while they do so. Indeed, since the Tribes themselves conveyed their interest in the property in the 1795 transaction upon which the current land-

over, even if the Tribes sought an actual order of ejectment in a future case, which they refrained from doing here, a monetary adjustment or offset presumably could be required to account for any improvements the current non-Indian occupants made on the land. *Green* v. *Biddle*, 21 U.S. (8 Wheat.) at 81-82.

Nor do we suggest in the circumstances of an Indian land claim such as that involved here that a court would necessarily be bound by rules regarding the award of mesne profits developed in more conventional settings. "Equity eschews mechanical rules; it depends on flexibility" (*Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946)) in order that the court may "locate 'a just result' in light of the circumstances peculiar to the case" (*Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. at 373, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424-425 (1975)). For example, if the equities appeared to warrant, a court might limit monetary relief to requiring a landowner to disgorge only those rents or profits he actually received, rather than requiring a private homeowner to pay the Tribes whatever amount he might have realized if the land had been rented to others or used for a profitable venture. Cf. *New Orleans* v. *Gaines*, 131 U.S. 191, 217-219 (1889); but see, *e.g.*, *Dime Savings Bank* v. *Altman*, 275 N.Y. 62, 9 N.E.2d 778 (1937).

In extreme circumstances, it is arguable that equitable considerations might even wholly bar relief in a suit by an Indian tribe (cf. *Kirk* v. *Hamilton*, 102 U.S. 68 (1880)), even though they would not in a suit by the United States (see *Utah Power & Light Co.* v. *United States*, *supra*). For example, in *Felix* v. *Patrick*, 145 U.S. 317, 330-335 (1892), this Court relied on equitable considerations in requiring dismissal of a suit. In *Felix*, an Indian had acquired scrip that entitled her to locate land on the public domain and then conveyed it (along

owners rely for their right of possession, it is conceivable that a court might conclude that the landowners' liability should not begin to run in a suit by the Tribes until the court has actually rendered a decision invalidating that transaction.

with a quitclaim deed and power of attorney in blank) to a non-Indian, in violation of a statutory provision rendering any conveyance of scrip void. Twenty-seven years later, the heirs of the Indian filed a bill in equity seeking to have the court set aside the conveyance of the scrip and to declare that all of the lands and proceeds acquired by the non-Indian and his successors in interest through use of the scrip were held in a constructive trust for the heirs' benefit. The Court affirmed the dismissal of the bill for want of equity, stressing that a large part of the land sought to be recovered by the Indian plaintiffs had since "been platted and recorded as an addition to the city of Omaha, and * * * sold to purchasers * * * [with little, if any] notice of the infirmity [of] their title" (145 U.S. at 326) and that substantial improvements had been made on the land (*id.* at 334). The Court also stressed the disproportion between the original value of the scrip ($150) and the value of the improved property the Indians sought to possess ($1 million) (*ibid.*).[28]

There are, to be sure, differences between *Felix* v. *Patrick* and this case. This case involves a void conveyance by a tribe, not an individual Indian; moreover, here, unlike in *Felix*, Congress did not, under the decision below, formally relinquish federal control over the land in question. Cf. *Oneida*, 414 U.S. at 675-678; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 670-671. But although these factors might weigh against interposing an equitable bar, the countervailing factors weighing in favor of such a bar have even greater force here than they did in *Felix*. The delay in filing suit is far longer; the disproportion between the original and current values of the property presumably is far greater; and we may assume that the relationship between the current landowners

[28] In contrast, in *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922), the Court declined to apply the defense of laches in a suit by an Indian where legal title was still in the hands of the original purchaser and there was no good faith transaction. *United States* v. *Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976); *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

and the original wrongdoer (the State) is for the most part considerably more attenuated. In addition, the Oneidas apparently had more opportunities than did Felix and her heirs to repudiate or challenge the invalid transaction and thereby dispel the impression of having abandoned any claim they might have had to the land.[28] Finally, whatever the relative stature and numbers of

[28] It is well established that Indians could abandon their aboriginal lands and thereby relinquish any claim to them, without the need for the approval of the presiding sovereign. See, *e.g.*, *Mitchel v. United States*, 34 U.S. (9 Pet.) at 745. Where the Indians did not unilaterally depart from the land, but instead left after selling it, the purpose of the Trade and Intercourse Acts to prohibit such unauthorized transactions would be undermined by a holding that the tribe had abandoned the land at the moment of sale. But it does not necessarily follow that Indians must thereafter have a right in perpetuity to repudiate the transaction or sue on their own behalf to have it set aside. Other persons who were under a legal disability at the time of a transaction ordinarily do not have an unlimited period of time to repudiate the transaction after the disability is removed. Cf. *Cholmley v. Molony*, 57 U.S. (16 How.) at 297-298. In this case, the Indians' disability to sell the land has not been removed. Nevertheless, it could be argued that the purpose of protecting Indians in their possession of property by affording them a right to sue is sufficiently accomplished after passage of a reasonable period of time during which the Indians could disavow an unauthorized transaction and thereby negative any inference that they had voluntarily abandoned their claim to the land, at least if compelling countervailing equities accrue during that period.

This is not to say that the title or right of occupancy the non-Indian purchased from the Indians would be valid as against the sovereign and its grantees after their passage of time. The restraint on alienation embodied in the Trade and Intercourse Acts also served the important public purpose of retaining for the sovereign the exclusive right to purchase Indian lands in order to eliminate potentially hostile competitors. For this reason, this Court on several occasions has described the prohibition as deriving not from an inability of the Indians to sell, but from the inability of the non-Indian to purchase without federal approval. See, *e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). The United States accordingly would not be barred by the passage of time from bringing an action to have the unauthorized sale set aside to protect Indian interests or the public interest more generally (*FPC v. Tuscarora Indian Nation*, 362 U.S. at 119; *Nevada v. United States*, slip op. 30-31); and

Oneidas and non-Indians in central New York in 1795, the non-Indians occupying the land now vastly outnumber the Oneidas claiming it, many of whom have long since left New York, and the Oneidas themselves could not meaningfully occupy the entire 100,000-acre tract and the thousands of homes, businesses and other improvements that have been made on it.

In light of the foregoing factors, a court in a future case might determine whether or in what manner the analysis of *Felix* should apply to the alienation of tribal land by the Oneida Nation in 1795[29]—at least insofar as

where it owned the underlying fee, the United States could grant a patent to a second non-Indian, whose title would take priority over that of the person who had purchased directly from the Indians (see, *e.g.*, *Johnson v. M'Intosh*, *supra*). But vindication of this distinct sovereign interest does not require that the Indians' own right to sue to recover possession of the property must continue for an equivalent period.

In this case, however, it may be relevant that the lands at issue were protected by treaty. Article II of the Treaty of Canandaigua provides that the Six Nations' reservations "shall remain theirs, until they choose to sell them to the people of the United States, who have a right to purchase." 7 Stat. 45. This language might be read only to state the principles governing aboriginal occupancy that would have applied even in the absence of the Treaty, rather than to confer any additional property interest on the Indians (cf. *Montana v. United States*, 450 U.S. 544, 553 (1981)), especially since the State owned the underlying fee. In *Williams v. City of Chicago*, 242 U.S. 434, 437-438 (1917), this Court found that an Indian tribe had abandoned land that was protected by a similar federal treaty. Yet, it is also plausible to view the Oneidas' title to the lands as sufficiently "recognized" or "confirmed" by the United States that it would be unaffected by the Indians' withdrawal from actual occupancy or by their failure to reassert a claim to the land after selling it.

[29] Cf. *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926); *New York Indians v. United States*, 30 Ct. Cl. at 402. However, because the Trade and Intercourse Acts explicitly render any unauthorized sale invalid, the equitable defense of bona fide purchaser, which is not routinely available in a suit brought by the United States on behalf of Indians in the absence of a statute so providing (*Northern Pacific Ry. v. United States*, 227 U.S. 355 (1913)), presumably would not be automatically available in a suit brought by a tribe either.

the Tribes might bring an action against current owners of the land in the 100,000-acre area other than the State, as the original wrongdoer, and perhaps the Counties, as political subdivisions of the State that arguably should be associated with the State for purposes of applying equitable defenses. Even if a court were to conclude, however, that a weighing of the equities indicated that recovery of some or all of the land should be denied in a suit by the Tribes, other alternatives might yet remain. A court could consider whether it would be appropriate to award a money judgment based on all or a portion of the value of the Tribes' extinguishable possessory interest in the land (*cf. Green* v. *Biddle*, 21 U.S. (8 Wheat.) at 77) or a money judgment in some other amount if it appeared that the State had paid the Tribes inadequate consideration for the land or realized a profit from its subsequent disposition to settlers (*cf. Felix* v. *Patrick*, 145 U.S. at 334). It might also be possible for a court to withhold an order of ejectment conditioned upon payment of a nominal ground rent reflecting a subsisting tribal possessory interest in the land that has not yet been extinguished by Congress (*cf. United States* v. *Forness*, 125 F.2d 928, 941-942 (2d Cir.), cert. denied, 316 U.S. 694 (1942)).

CONCLUSION

Because the questions we have discussed in Point II have not been presented by petitioners, and because the court of appeals correctly disposed of the issues discussed in Point I, the judgment of the court of appeals should be affirmed insofar as it affirms the district court's finding of liability on the part of the Counties.

Respectfully submitted.

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REPLY

BRIEF

Supreme Court, U.S.
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Nos. 83-1065, 83-1240.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Brief of the County of Oneida, New York, and the County of Madison, New York, as Petitioners in No. 83-1065.

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The Counties of Madison and Oneida, New York ("the Counties") submit this brief in reply to the briefs filed by the Oneida Indian Nation of Wisconsin and the Oneida Indian Nation of New York ("Brief of Wisconsin-New York Oneidas"), by the Oneida of the Thames Band Council ("Brief of Thames Oneidas"), and by the Solicitor General on behalf of the United States as Amicus Curiae.[1]

Argument.

I. THE ONEIDAS DO NOT HAVE A CAUSE OF ACTION AGAINST THE COUNTIES UNDER FEDERAL LAW.

A. *The Oneidas Do Not Have an Implied Right of Action under the Trade and Intercourse Acts.*

The Oneidas suggest that the analytic approach to be used here in determining whether a right of action should be implied is that set forth in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33 (1916). Brief of Thames Oneidas at 17; Brief of Wisconsin-New York Oneidas at 29-30. It is far too late in the day to suggest that the *Rigsby* approach — which would provide a right of action to virtually anyone who suffered an injury as a result of a statutory violation — should be applied to all statutory enactments which predate *Cort* v. *Ash*, 422 U.S. 66 (1975). *See California* v. *Sierra Club*, 451 U.S. 287, 298-301 (1981) (Stevens, J., concurring). The modern approach, as set forth in cases such as *Daily Income Fund, Inc.* v. *Fox*, 104 S.Ct. 831 (1984), should control.

1. Statutory Framework and Language.

The primary contention of the Oneidas with respect to the actual text of the 1793 Act is based upon *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). The Oneidas argue that, as in *Transamerica*, the 1793 Act rendered noncom-

[1] In consideration of the volume of material already filed with the Court, the Counties do not reply here to all arguments advanced by the Oneidas and the Solicitor General. The Counties do not intend thereby to suggest that they are pursuing any of their arguments with less than complete vigor.

plying conveyances void, and that Congress must have accordingly intended that the issue of voidness could be litigated somewhere. Brief of Wisconsin-New York Oneidas at 27-28; Brief of Thames Oneidas at 24-25.

The 1793 Act, did not, however, render conveyances "void"; it provided that such conveyances would not be of "any validity *in law or equity*" (emphasis added). That phrasing plainly contemplates a lack of enforceability, rather than voidness. Had Congress merely intended to make such conveyances void, it would have been completely unnecessary to have added the phrase "in law or equity" in 1793.[2] Such disabilities were removed by subsequent versions of the Trade and Intercourse Acts, making the conveyances fully valid and enforceable. *See* Brief of Counties at 38.[3]

The Oneidas virtually ignore the other enforcement and relief mechanisms of the 1793 Act, such as the provision giving the President a specific ejectment-like remedy, the provision for informant's suits, and the provisions for criminal penalties. They further ignore the fact that a jurisdictional grant is given only to hear "crimes, offences and misdemeanors," not civil actions. All of the evidence provided by the text of the statute itself points at one conclusion: Congress did not intend to create a private right of action for Indian tribes.

2. Legislative History and Statutory Purpose.

a. LEGISLATIVE HISTORY.

Much is made by the Oneidas of a reply by President Washington on December 29, 1790, to a speech by Complanter,

[2] The 1790 Act provided that "no sale [by any tribe] . . . shall be valid" unless made pursuant to the authority of the United States. 1790 Act, § 4. The 1793 Act, in contrast, provided that "no purchase or grant [from any tribe] . . . shall be of any validity in law or equity" unless so made. 1793 Act, § 8. Thus, the 1790 Act focused on the *sale*, which was declared invalid, whereas the 1793 Act focused on the *purchase*, which could not be enforced in a court of law or equity.

[3] The decisions of this Court cited by the Oneidas which held that certain transactions involving Indians were void did not construe language similar to the "no validity in law or equity" clause of the 1793 Act. *See Bunch* v. *Cole*, 263 U.S. 250, 253 (1923) (statute providing that certain leases would be "absolutely null and void"); *Ewert* v. *Bluejacket*, 259 U.S. 129, 135 (1922) (statute providing that "no person employed in Indian affairs shall have any interest or concern in any trade with the Indians"); *United States* v. *Noble*, 237 U.S. 74, 76 (1915) (statute prohibiting lease of allotted lands exceeding specified duration).

a Seneca chief, which is said to constitute legislative history supporting a private right of action. Brief of Wisconsin-New York Oneidas at 26-27; Brief of Thames Oneidas at 28. That reply states in part:

> You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. . . . But it does not appear, from any proofs yet in possession of the Government, that Oliver Phelps has *defrauded* you.
>
> If, however, you have any just cause of complaint against *him*, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.

1 American State Papers, Indian Affairs 139 (1834) (emphasis added). The Senecas' complaint against Mr. Phelps was that he had fraudulently induced them to sell certain land, and that he had failed to pay money owed to them from the sale. Washington's use of the term "defrauded" therefore undoubtedly referred to an action for fraud, not an action for ejectment under the 1790 Trade and Intercourse Act. Washington went on to state:

> you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians. For the particular meaning of this law, I refer you to the explanations given thereof by Colonel Timothy Pickering, at Tioga, which, with the law, are herewith delivered to you.

Id. Colonel Pickering, however, did not believe that Washington's reference to potential redress in the federal courts was an accurate statement of the law. His 1794 memorandum on the speech states:

> See President's Speech Dec. 29, 1790. Mentioning redress to the Indian Nation in the Federal Courts. *Let then provision be made by law to give them redress in our Courts* — & to compel parties to provide for a permanent fulfilment [sic] of engagements, particularly such as that of O.P. [Oliver Phelps] for an annuity perpetual.

62 Pickering Papers 97 (Massachusetts Historical Society, microfilm edition) (emphasis added) (appendix A). Thus, Colonel Pickering's "explanation" of the "particular meaning" of the law, to which Washington deferred, was that tribes had no rights of action in federal court. Taken in its proper context, Washington's reply is simply too slender a reed from which to infer an entire private right of action.

The Oneidas also point to the 1822 enactment of a burden of proof statute as evidence supporting the existence of a private right of action. Act of May 6, 1822, 3 Stat. 682.[4] It provides that in all trials regarding the right of property between an Indian and a "white person", the "white person" has the burden of proof whenever the Indian makes out a presumption of previous possession or ownership. The Oneidas argue that the statute necessarily contemplates litigation enforcing Indian property rights, and that therefore Congress intended to provide a right of action to tribes suing under the 1793 Act.

The Oneidas' contention suffers from a number of serious flaws. First, the views of the 1822 Congress as reflected in that statute are entitled to little, if any, weight in determining whether the 1793 Congress intended to create a private right of action 29 years earlier. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980). Second, as this Court has noted, Congress intended that the 1822 Act should apply only to "disputes arising in Indian country, disputes that would not arise in or involve any of the States." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667-68 (1979). Thus, the statute literally does not apply to this claim.[5]

[4] That statute was later incorporated into the 1834 Trade and Intercourse Act, and is now codified at 25 U.S.C. § 194.

[5] In addition, of course, a county is not a "white person." *See Leading Fighter* v. *County of Gregory*, 89 S.D. 121, 230 N.W.2d 114 (1975); *see also Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 667-668, 678 (state not a "white person").

More importantly, Congress cannot have intended that tribes could bring federal claims in federal courts, because tribes were not then considered to have capacity to sue, and federal courts were then without jurisdiction to hear claims brought by tribes. *See* Counties' Brief at 20 n.18. If the latter point was at all in doubt in 1822, it was certainly no longer by 1834, after the landmark decision of *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831). Congress must have accordingly believed that the statute would apply in other situations, including at least six types of suits that could have been brought in the early nineteenth century.

First, it could have applied to suits in the territorial courts involving Indians or Indian tribes. The legislative history of § 22 of the 1834 Act (which reenacted the 1822 statute) makes clear that the provision was "intended to apply to the whole Indian country, as defined in the first section." H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834). Indian territory was defined as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished." 4 Stat. 729. *See generally Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 667-68. That definition suggests that the territorial courts operating in those areas would be the only fora in which the statute would apply.[6] Indian plaintiffs could have invoked the statute in these courts for suits over property.[7]

[6] These territorial courts were set up by statutes distinct from those establishing federal courts. *See, e.g.*, Laws of the Territory of Michigan, Act of December 21, 1820, Sheldon & Reed, Detroit p. 313 (1820) (establishing court system); Laws of the Territory Northwest of the River Ohio, Ch. XLIV, Cincinnati (1833) (establishing courts of judicature).

[7] *See* Laws of the Territory of Michigan, *supra*, at 477-78 (Act of June 29, 1821; Indians who bought liquor from any person could seek restoration of the Indian's property given for the liquor "on giving satisfactory proof to any justice of the peace within the territory, that the articles so claimed, are actually the property of the Indian or Indians who make the claim.").

Second, it could have applied to state court suits brought by whites against individual Indians to enforce land sale contracts. Indians were, in the absence of statutes to the contrary, subject to suits in state courts,* and the need for the statute to shift the burden of proof was particularly acute in state courts because Indians often lacked the capacity to testify. *See* Committee Report on the 1834 Trade and Intercourse Act, H.R. Rep. No. 474 at 13 (May 20, 1834) ("Complaints have been made by Indians that they are not admitted to testify as witnesses; and it is understood that they are in some States excluded by law"); N.Y. Indian Law, Ch. 420, § 2, p. 576 (1849) (rendering Indians competent witnesses to prove certain violations of the New York Trade and Intercourse Act). Because Indians would normally have the burden of proof on affirmative defenses such as illegality, *see, e.g., Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F.2d 913, 916 (2d Cir. 1951), the statute could operate to shift the burden.

Third, the statute could have shifted the burden of proof on state-based claims brought by individual Indians in state courts. The courts of many states were open to individual Indians, *see Felix* v. *Patrick*, 36 F. 457, 461 (C.C.D. Neb. 1888) (citing the burden of proof statute for the proposition that individual Indians could bring state court actions relating to their land), *aff'd.* 145 U.S. 317 (1892), and Congress had the power to shift the burden of proof in such cases. *See Leading Fighter* v. *County of Gregory*, 89 S.D. 121, 230 N.W.2d 114 (1975) (statute not applied to Indian's suit challenging the tax taking of his land only because the county was not deemed a white person).

Fourth, the statute could have applied to informant's suits under the Trade and Intercourse Acts brought by individual Indians in either state or federal court.*

Plummer v. *Hubbard*, 201 N.Y. Supp. 747, 749, 207 App. Div. 29 (1923) ("In the absence of federal statute or existing treaty, or state statute, a state court has jurisdiction of an action on contract in favor of a white man against an Indian belonging to a tribe and a particular reservation"); *Bem-Way-Bin-Ness* v. *Eshelby*, 87 Minn. 108, 91 N.W. 291 (1902); *Stacy* v. *LaBelle*, 99 Wis. 520, 75 N.W. 60 (1898); *Stevenson* v. *Christie*, 64 Ark. 72, 42 S.W. 418 (1897).

* At common law, suits for penalties were often prosecuted by informants, and the right of informants to bring such suits (also known as *qui tam* actions) is recognized in federal statutes. *United States* v. *Stocking*, 87 F. 857, 861 (D. Mont. 1898). *See, e.g., Adams* v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) (informant's suit against slave trade); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) (*qui tam* action for fraud on the government). Indians were clearly entitled to bring informant's suits under the provisions of § 12 of the 1793 Act, now codified at 28 U.S.C. § 201. *See United States ex rel. Hornell* v. *One 1976 Chevrolet*, 585 F.2d 978 (10th Cir. 1978); *United States ex rel. Chase* v. *Wald*, 557 F.2d 157 (8th Cir.), *cert. denied*, 434 U.S. 1002 (1977); *United States ex rel. Whitehorse* v. *Briggs*, 555 F.2d 283 (10th Cir. 1977).

Fifth, the statute could have applied to suits on state claims by individual Indians which were brought in federal court under pendent jurisdiction. *See Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824). For example, if an Indian had brought a federal court informant's action relating to tribal land, and had added a state-based fraud claim to rescind the sale of his private reserved land, the statute would have shifted the burden of proof on the personal claim as well as on the informant's action.

Finally, the statute could have applied to suits brought by the United States or some other governmental body on behalf of Indians. The statute does not require that an Indian be a party in order for it to operate; rather, it applies to suits where Indians "may" be a party. Because an Indian might be a party as an informant, the statute might apply to suits under the Trade and Intercourse Acts brought by the United States. Similarly, New York had a statute authorizing ejectment actions against non-Indians on Indian lands. New York Indian Law, c. 234, § 8 (1841); *see Johnson* v. *Long Island R. Co.*, 162 N.Y. 462, 56 N.E. 992 (1900). Such actions could only be brought "by the district attorney of the county, or in the name of the nation, tribe or band, by any three of the chiefs, head men, or councilors thereof." *Johnson, supra*, 56 N.E. at 993. Because here, too, Indians *could* be parties, the statute might shift the burden of proof in state actions brought on their behalf.

b. STATUTORY PURPOSE.

Citing authority such as *United States* v. *Candelaria*, 271 U.S. 432, 441 (1926), the Oneidas maintain that the purpose of the 1793 Act was to prevent the improvident disposition of

tribal land in order to prevent Indians from becoming "homeless public charges." Brief of Wisconsin-New York Oneidas at 25-26.[10] Such an interpretation would have undoubtedly astonished the members of the Second Congress. In 1793, most Indian tribes were powerful and bellicose entities, potentially subject to the influence of the British, French, and Spanish; they were *not* helpless wards confined to meager allotments. Congress desired to avoid destructive retaliations by the frontier tribes and, more importantly, to prevent an all-out war which could devastate the struggling new nation. F. Prucha, American Indian Policy in the Formative Years 36, 44, 48 (1962). The Trade and Intercourse Acts were believed to be the most prudent and reasonable means of keeping the peace. *Id.* at 44-48. Any other intepretation of the purpose of the 1793 Act simply substitutes modern attitudes for historical fact.[11]

3. Adequacy of Express Remedies to Serve the Legislative Purpose.

The Oneidas contend that "tribal suits are essential to effectuate the protective purpose of the [1793] Act," because otherwise "tribes have no sure means of recovering possession of lands lost in violation of the Act." Brief of Wisconsin-New York Oneidas at 30. That argument assumes that the prevention of the sale of tribal lands was a purpose unto itself, rather than a means of preserving peace along the Indian frontier. In

[10] *United States* v. *Candelaria* involved the 1834 Act, not the 1793 Act. This Court has suggested elsewhere that the purpose of the Acts may have evolved over the years. *See Wilson* v. *Omaha Indian Tribe*, *supra* 442 U.S. at 664 ("a major purpose of these Acts *as they developed* was to protect the rights of Indians to their properties") (emphasis added). It cannot be disputed, however, that the aim of the 1793 Act was solely the preservation of peace, regardless of whatever purpose may have been served by the 1834 Act.

[11] The Oneidas' argument that they are a benefited class under the 1793 Act is premised entirely upon the assumption that the Second Congress intended to prevent land sales in order to protect the Indians from their own improvidence. As noted above, that assumption is without historical support. The 1793 Act was designed to preserve the peace, and accordingly was intended to benefit the public as a whole. Even if Congress intended to benefit tribes as a means of achieving its ultimate goal, it is unnecessary to imply a right of action on their behalf when other parties are given authority to vindicate tribal rights. *See Daily Income Fund, Inc.* v. *Fox*, *supra*, 104 S.Ct. at 841.

fact, as set forth in the Counties' Brief at 23, the remedies expressly set forth in the 1793 Act — including the ejectment-like remedy provided to the President — were specifically directed to the legislative object of preventing hostilities and confrontations between Indians and settlers, and should not be added to by this Court.[12]

B. *The Oneidas Do Not Have a Cause of Action under Federal Common Law.*

Notwithstanding several pages of argument, the Oneidas are unable to come up with a single decision of this Court authorizing a federal common law cause of action by an Indian tribe for trespass damages or ejectment. If such an action does not now exist, it must be created; and before it may be created, the Court must consider all of the restraints imposed by the rule of *Erie R.* v. *Tompkins*, 304 U.S. 64 (1938). *See* Counties' Brief at 25-27. Much more significantly, however, any such right of action has long since been preempted by the 1793 Act.

The Oneidas make a number of points in their argument that the 1793 Act had no preemptive effect. First, they contend that the 1793 Act was not substantively different than the 1790 Act, and accordingly the addition of new penalties and remedies in 1793 did not preempt any common law right of action. Brief of Wisconsin-New York Oneidas at 18. That argument cannot withstand analysis. The 1790 Act contained no penalties whatsoever for persons who violated the land sales strictures of § 4. The 1793 Act, in contrast, provided that (a) persons who illegally negotiated treaties were subject to criminal penalties, (b) persons who illegally settled on Indian land were subject to criminal penalties, and (c) persons who illegally settled on Indian land were subject to discretionary removal

[12] Indeed, it requires a fanciful view of history even to suggest that civil remedies were relevant to accomplish the purposes of the 1793 Act. It is beyond dispute that the 1793 Act was intended, at least with respect to land matters, to address the situation on the frontier. By definition, this area was the least organized and most chaotic area subject to congressional jurisdiction. It would have seemed ludicrous to Congressmen, frontiersmen, and Indians alike to suggest that a trespasser could be ejected by means of a civil suit initiated by an Indian tribe. *See Beck* v. *Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30, 37 (8th Cir. 1884) (noting common view that ejectment was a "barren remedy" on the frontier).

by the President. 1793 Act, §§ 5, 8. Those provisions were specifically selected by Congress in order to further the delicate peace-keeping function and to ensure, as James Madison stated, "that this whole business should be under the absolute and sole discretion of the public authority." Counties' Brief at 23. The Oneidas now seek to create an additional option: (d) persons who illegally settled on Indian lands were subject to trespass damages in private suits. That option is foreclosed by the preemptive effect of the carefully tailored scheme chosen by Congress. *See Smith* v. *Robinson*, 104 S.Ct. 3457, 3470 (1984).

The Oneidas' second contention as to preemption is somewhat curious, to say the least. The Oneidas argue that the 1793 Act "did not speak directly to the issue of *tribal* remedies," and therefore the Act did not preempt any such remedies. Brief of Wisconsin-New York Oneidas at 19 (emphasis added); *accord*, Brief of Thames Oneidas at 14. In other words, the Oneidas maintain that there were two possibilities: either Congress could have specifically provided for tribal remedies (and thus they would be available) or Congress could have *not* specifically provided for tribal remedies (and thus they would be available because they were not preempted). Under that theory, Congress would be required to specifically negate the existence of tribal remedies, by providing, for example, that "no tribe may bring suit under this act." The preemption doctrine has never been read so narrowly by any court.

Finally, the Oneidas are reduced to arguing that the 1793 Act does not match up in length and breadth against the 1972 statute under consideration in *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). Brief of Wisconsin-New York Oneidas at 20-22. As noted in the Counties' Brief at 30, this Court has given preemptive effect to modern statutes much less sweeping then the 1793 Act. Moreover, the comprehensiveness of a statute enacted in the 1700's cannot be measured by the standards of 1984, but must necessarily be read in the context of the day; in fact, the Trade and Intercourse Act of 1793 was one of the most elaborate statutes enacted by the early Congress. Counties' Brief at 29-30.[11] That Act was plainly intended to be the sole source of remedial authority for illegal settlement on Indian land.

II. The Oneidas' Claim Is Barred by the Applicable Statute of Limitations.

The basic contention of the Oneidas on the limitations issue may be simply stated: no federal statute of limitations applies to this claim; no state statute of limitations may be borrowed, because to do so would be "inconsistent" with federal Indian policy; therefore no statute of limitations of any kind applies; and therefore this claim may be brought notwithstanding the passage of nearly two centuries.

Perhaps because they realize that it would be "utterly repugnant" to our legal system to allow a claim to languish forever without being subject to a time bar, *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805), the Oneidas have cast about for some congressional imprimatur for their theory. They have focused upon a handful of statutes, principally 28 U.S.C. § 2415.

A. *The Incorporation of a State Statute of Limitations Would Not Be Inconsistent with Federal Indian Policy.*

It is well-settled that, in the absence of a controlling federal statute of limitations, federal courts should ordinarily borrow analogous state limitations periods. *DelCostello* v. *Teamsters*,

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[11] The Thames Oneidas maintain that the act is not comprehensive because it does not address the question of enforcement by tribes, states, or land companies. Brief of Thames Oneidas at 14. The simple answer to that point is that Congress did not intend that any party other than the United States should have enforcement powers. *See Block* v. *Community Nutrition Institute*, 104 S.Ct. 2450, 2455 (1984) (although statute was enacted in part to benefit consumers, consumers had no standing when other parties were given specific rights under legislative scheme). The failure to specifically mention the building of roads, the grazing of livestock, or the like is not remarkable, for those activities are but particularized forms of settlement and trespass.

103 S.Ct. 2281, 2287 (1983)." The only exception potentially applicable here is that federal courts may not apply state statutes which are "inconsistent" with federal law or policy. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977).

The Wisconsin and New York Oneidas offer but a single potential "inconsistency": the application of a state statute "would effectively enable the Counties to claim title to Oneida lands without the requisite federal consent." Brief of Wisconsin-New York Oneidas at 42. The Thames Oneidas make a similar argument: "The application of a state statute of limitations would significantly undermine this policy of federal protection [of Indian lands], by permitting a violation of the Act to go unremedied." Brief of Thames Oneidas at 37.

In other words, according to the Oneidas, the application of a state statute of limitations would be "inconsistent" with federal Indian policy because it would bar the claim, and thereby cause them to lose the litigation. That argument is absurd on its face, and has been specifically rejected by this Court. *See Board of Regents* v. *Tomanio*, 446 U.S. 478, 488 (1980).

The Thames Oneidas go on to make an additional argument: "The borrowing of state law here would also frustrate the strong federal policy of maintaining uniform national rules governing disposition of Indian land." Brief of Thames Oneidas at 37. More properly stated, the question is whether there is any compelling need for a nationally uniform statute of limitations governing property claims such as this. That inquiry is controlled by the three factors set forth in *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 672-74.

First, as in *Wilson*, there is no reason "why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law." *Id.*, 442 U.S. at 673. While the states may differ among themselves, all claims against property owners in New York State will be treated

[14] Lawsuits brought to vindicate important federal rights are, of course, routinely governed by borrowed state limitation periods. *See, e.g., Burnett* v. *Grattan*, 104 S.Ct. 2924 (1984) (civil rights).

identically. Second, "there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests." *Id.* Such an "injury" would occur only where a tribe has waited too long to sue; even in such a case, the United States retains the power to institute remedial litigation on its behalf should such an action prove necessary to vindicate significant federal interests. Additionally, as the *Wilson* court noted, there is no question of "hostile and unfavorable treatment at the hands of state law," for "the legal issues are federal and the federal courts will have jurisdiction to hear them." 442 U.S. at 673-74. Finally, this is "an area in which the States have substantial interest in having their own law resolve controversies such as these." 442 U.S. at 674. As the Court stated, "private landowners rely on state real property law when purchasing real property," and the security of their titles should not depend on the vagaries of being within the boundaries of one or another ancient Indian treaties. *Id.*

The Oneidas offer no other actual or potential "inconsistencies" precluding the incorporation of state limitation periods. Furthermore, as noted in the Counties' Brief at 35 n.28, there is a strong countervailing federal policy favoring repose, particularly where titles to real estate are involved. That policy, in the case of a lawsuit that is two centuries old, must surely overwhelm any policy demanding the application of uniform statutes of limitation to Indian claims.

B. *There Is No Evidence that Congress Intended to Preclude the Incorporation of State Statutes of Limitations to Claims Brought by Indian Tribes.*

In their search for some congressional endorsement of their theory that no statute of limitations applies to this claim, the Oneidas have identified three separate statutes: 28 U.S.C. § 2415, 25 U.S.C. § 233, and 28 U.S.C. § 1362.

28 U.S.C. § 2415 provides a statute of limitations in certain actions brought by the United States.[15] When first enacted in

[15] The Wisconsin and New York Oneidas inexplicably maintain that the present version of 28 U.S.C. § 2415 *specifically* provides that claims brought by tribes are governed by the same statute of limitations as the United States. Brief of

1966, it did not contain any reference to suits brought on behalf of Indian tribes. Act of July 18, 1966, Pub.L. 89-505, 80 Stat. 304. It was amended in 1972 — two years after the institution of this suit — to include a limitation period for certain claims brought on behalf of Indian tribes. Act of July 18, 1972, Pub.L. 92-353, 86 Stat. 499. Congress extended that limitation period in 1977 and 1980. Act of July 11, 1977, Pub.L. 95-64, 91 Stat. 268; Act of March 27, 1980, Pub.L. 96-217, 94 Stat. 126. Finally, in 1982, Congress enacted an elaborate limitation mechanism which sought to cut off certain claims which could have been brought by the United States on behalf of Indian tribes. Act of Dec. 30, 1982, Pub.L. 97-394, 96 Stat. 1976.[16]

That statute, however, has *never* contained any reference to actions *brought by tribes themselves*. As the statutory history indicates, Congress was very much aware that the statute did not apply to claims brought by tribes. *See* Counties' Brief at 32-33. It is therefore plain, absolutely beyond argument, that Congress did not intend 28 U.S.C. § 2415 to apply to such claims. The Counties are unable to comprehend how the Oneidas could possibly maintain that a statute which Congress did *not* intend to apply to claims brought by tribes should be *applied* to such claims in order to further congressional intent.

Indeed, to the extent Congress' intent in enacting § 2415 is relevant at all, it works against the Oneidas' theory. By deliberately omitting suits brought by tribes themselves, Congress must have intended that such suits be governed by either (a) another federal statute of limitations, (b) no statute of limitations at all, or (c) state statutes of limitations, borrowed as a matter of federal law. The first possibility is easily eliminated: there is no relevant federal statute. It is very unlikely Congress intended the second; it would make the entire limitations

Wisconsin-New York Oneidas at 39-40. That position is without any textual support whatsoever. Even the Thames Oneidas do not claim that § 2415 literally applies, but only that it is an indication of congressional "policy." Brief of Thames Oneidas at 39.

[16] The attention given to the 1982 Act tends to obscure the fact that this lawsuit was filed on February 5, 1970. The question, of course, is whether this claim was barred, as of the day it was filed, under the then-existing state of the law. A statute enacted a dozen years later is of limited value, at best, in ascertaining the law in 1970.

mechanism, enacted in 1982 in order to provide a measure of finality to Indian land claims, nothing but a meaningless charade. Furthermore, it would run counter to the long-established principle that all claims should be subject to some limitation period, a principle of which Congress must be presumed to be aware. *See Adams* v. *Woods, supra*. Congress accordingly should be presumed to have intended that claims brought by tribes should be subject to borrowed state limitation periods.[17]

The second statute cited by the Oneidas is 25 U.S.C. § 233. That statute, as noted in the Court's 1974 opinion in this case, was intended to provide New York with civil jurisdiction in certain actions involving Indians. 414 U.S. at 679-82. In order to ensure that disputes between Indians and New York over rights to land would remain in a federal forum, and to ensure that the grant of jurisdiction would not operate retrospectively, the following proviso was added:

> Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

See 414 U.S. at 680-82. The Counties do not suggest that § 233 should be construed to make the laws of New York applicable to this action. Rather, they contend that a state limitation period should be borrowed and incorporated as a matter of federal law in the absence of a controlling federal statute of limitations. The legal issues remain federal, and

[17] The Solicitor General suggests that § 2415 should be applied to claims brought by tribes for two reasons: first, because the "same underlying claim" is involved whether the United States or a tribe sues, and second, because the United States and a tribe, working in "close coordination," would arrive at the same conclusion in considering whether to sue, and thus no repose would be achieved. Brief of United States at 22. Both arguments are premised on the dubious notion that the United States government and small groups of Indians (who stand to gain billions of dollars if they are ultimately successful) should be treated exactly the same. The second argument, of course, is further belied by the fact that the United States specifically declined to prosecute this action, as appropriate proceedings were pending before the Indian Claims Commission. (Jt. App. at 42a-44a).

federal courts have jurisdiction to hear them. *See Wilson* v. *Omaha Indian Tribe, supra*, 442 U.S. at 673-74.[18]

Finally, the Oneidas cite 28 U.S.C. § 1362 for the proposition that "tribal claims should be treated the same as suits filed by the United States [*i.e.*, governed by 28 U.S.C. § 2415] with respect to the applicable statute of limitations." Brief of Wisconsin-New York Oneidas at 40. Section 1362 provides *subject matter jurisdiction* for suits brought by Indian tribes. As the House Judiciary Committee Report accompanying its passage noted,

> The district courts now have jurisdiction over cases presenting Federal questions brought by the tribes when the amount in dispute exceeds $10,000. Enactment of this bill would merely authorize the additional jurisdiction of the court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount.

H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3145, 3146.

While the effect of § 1362 was to provide Indian tribes with the same jurisdictional access to federal court as the United States, *see Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-73 (1976), that section was hardly intended to mean that all references in the United States Code to "the United States" should be read to mean "the United States or an Indian tribe." 28 U.S.C. § 2415 is a statute of limitations, having nothing to do with subject matter jurisdiction, and § 1362 is absolutely irrelevant to its interpretation and effect.

As this Court stated in *DelCostello* v. *Teamsters, supra*, 103 S.Ct. at 2287, 2289, even in cases where it would be inappropriate to borrow state statutes of limitation, the correct procedure is to employ either another federal limitation or an

[18] The remarks of Rep. Morris, cited by the Oneidas, merely indicate that § 233 was not intended to destroy any preexisting rights an Indian tribe may have had. The statute could not, of course, revive a cause which had already expired prior to its adoption. *Stewart* v. *Keyes*, 295 U.S. 403, 417 (1935).

The debate in the Congressional Record further indicates that § 233 was intended to affect only one tribe, the Senecas. 96 Cong. Rec. 12453, 12455 (Aug. 14, 1950). Congress thus apparently did not believe in 1950 that the Oneidas could ever become a recognized tribe in New York, and therefore § 233 is further evidence that Congress intended to ratify prior sales in New York by the Oneidas.

alternative such as laches.[19] It is manifestly unjust to hold that a private claim should be without any limitation whatsoever, and doubly so when the effect is to preserve a claim that is two centuries old.

III. The United States Subsequently Ratified the 1795 Conveyance to New York.

A. *Federal Ratification of Indian Land Conveyances Need Not Be "Plain and Unambiguous," But May Be Implied.*

The Oneidas, relying entirely on this Court's opinion in *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), argue that congressional intent to extinguish Indian property rights must be expressed plainly and ambiguously, and that therefore ratification of the 1795 conveyance may not be implied.

The relevant portion of *Santa Fe Pacific* involved an 1865 statute enacted by Congress for the purpose of creating a reservation for the Walapai tribe. 314 U.S. at 351-54. As the Court specifically noted, the tribe had not entered into any agreement of any kind regarding its land, nor had any treaty been proposed; Congress had acted unilaterally, without the knowledge or consent of the Walapais, in establishing a reservation. The Court held that the creation of such a reservation would not operate as an extinguishment of all Walapai property rights outside the reservation without plain evidence that Congress intended such a result. *Id.* The Court went on to hold, however, that the voluntary acceptance by the tribe, in 1883, of a military reservation created by executive order *did* implicitly constitute a release of tribal property rights outside the reservation. 314 U.S. at 358.

Thus, the *Santa Fe Pacific* court simply held that a unilateral congressional enactment, undertaken without the participation or consent of a tribe, would be subjected to close scrutiny before it would be found to extinguish Indian title. It also held,

[19] The Solicitor General cites *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922), for the proposition that statutes of limitation do not apply to Indian tribes. *Ewert* involved the application of laches to an individual Indian, not the application of a statute of limitations to a tribe. In any event, *Ewert* is not controlling for the reasons set forth in the brief of amici City of Escondido, *et al.*, at 22-24.

however, that in some circumstances Indian title could be implicitly extinguished. The issue here is whether Congress implicitly intended to ratify a voluntary sale of tribal land undertaken with the participation and consent of the tribe. There is no reason in law or policy why such ratification should be measured by the strictest possible standard, instead of by a common-sense inquiry: what result did Congress intend? That kind of pragmatic analysis is frequently undertaken by this Court in actions involving title to Indian land, *see, e.g., Solem* v. *Bartlett*, 104 S.Ct. 1161 (1984), and it should similarly be undertaken here.

B. *The 1795 Conveyance Was Impliedly Ratified by the United States.*

The points raised by the Oneidas in opposition to the Counties' ratification argument on the merits are adequately addressed in the Counties' Brief at 41-44, and in the various briefs filed by amici, Brief of American Land Title Association at 5-11; Brief of C.H. Albright *et al.* at 16-23. The Counties wish only to add the following in response to a point raised by the Solicitor General.

The Solicitor General argues that the Treaty of Buffalo Creek of 1838 between the Oneidas and the United States is an additional "consideration," not raised by the Counties, which might "limit or even bar relief in future cases." Brief of United States at 30. The Counties agree that the 1838 treaty is relevant consideration; it is further evidence of implicit congressional ratification of the 1795 transfer, and all other transfers involving the Oneidas that may not have complied with the Trade and Intercourse Acts. Regardless of whatever Congress may have intended prior to that time, it is obvious that by 1838 Congress intended that *all* Indian title in New York held by the Oneidas should be completely, and permanently, extinguished.

The Solicitor General, however, offers the Treaty of Buffalo Creek as evidence of the Oneidas' *implicit* relinquishment of the subject land, rather than as evidence of congressional ratification. The Counties agree emphatically with the Solicitor General that Indian title may be implicitly extinguished, and that the Oneidas long ago relinquished title to the subject land;

they join in his apparent invitation to the Court to hold that the Treaty of Buffalo Creek constitutes evidence of such relinquishment.[20] The Counties note, however, that the Solicitor General's implicit extinguishment argument cannot possibly be reconciled with his argument that Indian title may only be extinguished by a "plain and unambiguous" act of Congress.

IV. The Oneidas' Claim Should Be Barred on Equitable Grounds.

The Solicitor General further argues that "equitable considerations" may operate to limit the claims of the Oneidas in future litigation. Brief of United States at 33. The "equitable considerations" in question are not identified, but are presumably based upon the gross injustice of depriving innocent persons of their property, and forcing them to pay trespass damages, after two centuries of good faith occupation.

Again, the Counties welcome the support of the Solicitor General, but find certain aspects of his argument difficult to comprehend. The Solicitor General first argues that "equitable considerations" could be used to "inform the court's judgment" in fashioning relief. Brief of United States at 34. That is nothing more than a suggestion that the District Court should not utilize all of the weapons in its arsenal of remedial powers — a suggestion which, unfortunately, is not backed by any rule of law. Would it be within the sound discretion of a District Court to rule that the party which holds title to the land is also entitled to possession? Or that a trespasser should pay trespass damages? If so, is the Solicitor General arguing anything more than that the landowners should simply plead for mercy? What recourse do the landowners have if that mercy is not forthcoming?

More intriguing questions are posed by the manner in which the Solicitor General has framed his argument. If equity should limit the remedy, why should it not bar the right altogether? What principle provides that equity applies in one instance

[20] The Court is not precluded from deciding issues not addressed in the Court of Appeals or in the petition for certiorari. *See Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).

and not the other? Perhaps sensing the difficulties of that position, the Solicitor General goes on to argue that "[i]n extreme circumstances, it is arguable that equitable considerations might even wholly bar relief in a suit by an Indian tribe, even though they would not in a suit by the United States." Brief of United States at 36 (citations omitted). What sort of equity applies only in "extreme circumstances," and not otherwise? What *are* "extreme circumstances," if centuries-old claims affecting thousands of innocent persons do not qualify? If the Oneidas are subject to equitable defenses, but the United States is not, how can that be reconciled with the argument that Indian tribes and the United States are to be treated exactly the same with respect to litigating these claims? How can that "principle" be *controlling* as to statutes of limitation (Brief of United States at 21), and *irrelevant* as to laches?

The Solicitor General's attempts to appear reasonable, while supporting the claims of the Oneidas, have led him into a deep quagmire of inconsistency and illogic. This Court does not need, however, to attempt to find any coherency in that argument. While the Counties welcome the entry of any equity into this litigation — an event that can only operate to their benefit — they respectfully submit that the Court has more than ample grounds on which to reverse the judgment below, without needing to issue advisory opinions on the potential applicability of equitable defenses.

Conclusion.

For the foregoing reasons, and for the reasons urged in the Counties' principal brief, the judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the Counties, should be reversed.

Respectfully submitted,

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Dated: September 21, 1984

1. Encumbrances & ... fair Purchasers.

Amer. Inspection of the Gen. Govt. Like Encumbrances void ... fair purchases under the Regal Govt. Old proclamations & Letters. Sir W. Johnson held a treaty ... at Fort Stanwix in 1768. & drew a new line, including them all. Grants are said to dispute. The Indians will now do this from a present feeling & view. But they will soon from the improvement of their Circumstances. Settlers will above them to confide in what manner & on what conditions purchases to be made. to secure them from imposition

2. Path along the Lake.

Q. Does the British, on their side, keep a path along the Lake?
Q. Why then demand it of the United?

3. The Indians near the W. in the Lakes were, were composed, not of ... of some of their bands. Before the revolution by Engaging. Whether &c. The Lakes therefore being the Aggressors, were employed against in the war. Desolation spread to the W. bank of Sandusky. The W. Indians under Cornplanter & Brandt & families united & many from the Confederacy.

4. In voting, both Strings. after one for every ... fifth. Perhaps when there will every person speak, the number of strings, or notches around might correspond with the number of the ... in the order of seniority.

5. [Did not the Five Nations receive a large sum of money from the British to indemnify them for their Lands in the war with America?]

6. The Resolution passed Dec. 29. 1790. Mentioning refusal to the Indians relative to the Federal Courts. Let the provision be made by law to give them redress in our Courts & to appeal parties, to provide for a permanent fulfilment of engagements previously had with the U.S. & for an ... Treaty perpetual.

BEST AVAILABLE COPY

63 Pickering Papers 97 (Massachusetts Historical Society, microfilm edition)

REPLY

BRIEF

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No. 83-1240
No. 83-1065

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Petitioners,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reply Brief of the State of New York, Petitioner in No. 83-1240

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Dated: September, 1984

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No. 83-1240
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Petitioners,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Brief of the State of New York, Petitioner in No. 83-1240.

In Point I we will discuss some matters presented by the Indian tribes and the Solicitor General, while in Point II we deal with issues presented by the counties as respondents.

POINT I.

A.

Neither this Court's prior decision in this case (*Oneida Indian Nation v. County of Oneida*, 414 US 661 [1974]; *"Oneida I"*), nor any of the other authorities relied upon by the respondents in their respective briefs, support the existence of a federal common law right of action for damages in behalf of the Indian tribes against the petitioner counties.

In *Oneida I*, this Court, addressing solely the issue of jurisdiction, held that the claims asserted by the Oneidas in this action raised questions of federal law subject to federal court jurisdiction. Specifically exempted from discussion was any aspect of the merits of the claim:

> "• • • we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, *whatever may be the ultimate resolution of the federal issues on the merits.*" 414 US at 666-667; emphasis supplied.

The Court said further, 414 US at 675:

> "Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. *The claim may fail at a later state for a variety of reasons;* but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation • • • ." Emphasis supplied.

Since it is settled law that "a failure to state a proper cause of action calls for a judgment on the merits" (*Bell v. Hood*, 327 US 678, 682 [1946]), and since this Court specifically refrained from addressing the merits of the Oneidas' claim in ruling on the jurisdictional issue, it is clear that the Oneidas' reliance on that decision as determining the existence of a right of action here is wholly unwarranted.* Moreover, the fact that the federal courts have recognized the existence of "tribal property rights" does not, as the Oneidas suggest (Brief of Oneida Nations of Wisconsin and New York, pp 10-13; Brief of Oneida of the Thames Bank Council, pp 8-12), support the existence of a federal common law right of action in their behalf. It is a long step indeed from the recognition of a "property right" to the creation of a *federal* "right of action" under the *federal* common law for the recovery of damages based upon an infringement of such a property right. See,

---

*Cf. *Burks v. Lasker*, 441 US 471 (1979), where the Court, "assuming" the existence of an implied right of action for damages under the Investment Advisers Act of 1940, noted that "[t]he question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided". 441 US at 476, n 5. Six months later, in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 US 11 (1979), the Court decided that the right of action it "assumed" in *Burks* did not, in fact, exist. 444 US at 24.

Wheaton v. Peters, 33 US (8 Pet) 590 (1834); see also, Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action Under the Indian Trade and Intercourse Act*, 63 Boston Law Rev 853, 856-857 (1983). As was observed by Judge Meskill in his dissenting opinion (JA 250a):

> "There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law."

The Oneidas' contentions to the contrary should be rejected.

B.

In arguing that the Congress intended the Indian tribes to have a right of action under the Trade and Intercourse Act of 1793, the Oneidas rely heavily (Brief of Oneida Nations of Wisconsin and New York, pp 5, 30-31; Brief of Oneida of the Thames Band Council, pp 15, 28) upon the so-called "White Man's Burden" statute, 25 USC § 194, which was originally enacted in 1822, 3 Stat 682, and was later incorporated into the 1834 Trade and Intercourse Act, 4 Stat 729. This reliance is misplaced for several reasons.

First, insofar as the 1793 Trade and Intercourse Act is concerned, the views of the 1822 Congress are not directly relevant. See, e.g., *United States v. Oswego Barge Corp.*, 664 F2d 327, 342, n 22 (2d Cir, 1981); cf. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 US 353, 377-378 (1982). In addition, as this Court observed in *Wilson v.*

Omaha Indian Tribe, 442 US 653, 668 (1979), the Congress, in adopting the 1822 Act, "had in mind *only* disputes arising in Indian country, disputes that would not arise in or involve any of the States". Emphasis supplied. Moreover, when Congress enacted the 1834 Trade and Intercourse Act, it made the provisions of the Act, including the "White Man's Burden" statute, applicable only west of the Mississippi River; as to those Indian tribes in the east, the 1802 Act, which did not contain a burden of proof provision, remained effective. 4 Stat 729, 734. Thus, quite contrary to the Oneidas' assertions, 25 USC § 194 is not a reliable indicator of congressional intent vis-a-vis the 1793 Trade and Intercourse Act.

Furthermore, because tribal Indians did not have access to the federal courts in 1822 (see *Felix v. Patrick*, 145 US 317 [1892]), it is in any event unlikely that Congress intended by the enactment of the burden of proof statute to indicate that the Trade and Intercourse Acts created a private right of action in behalf of the Indian tribes. A more likely explanation, as noted by Judge Meskill in his dissenting opinion (JA258a), is that the provision was intended to apply, for example, to suits in which the government was seeking to enforce Indians' rights on their behalf. In such cases, the Indians would be the real parties in interest, and the burden of proof would not be with the government as plaintiff guardian. This explanation is not only consistent with the statute's language, but lends additional support to our view that judicial enforcement of the Trade and Intercourse Acts, if it is to be had at all, may only be initiated by the government.

C.

The Oneida Nations of Wisconsin and New York, and the United States in its brief as *amicus curiae*, suggest that

28 USC § 1362 supports the existence of a federal right of action in the Oneidas (Brief of Oneida Nations of Wisconsin and New York, pp 5, 31; Brief of United States as *Amicus Curiae*, pp 11-12). However, 28 USC § 1362 is a jurisdictional statute and thus cannot create any substantive rights. This point was made clear in *United States v. Mitchell*, 445 US 535 (1980).

There the claimants, individual allottees of land contained in the Quinault Reservation, the Quinault Tribe, and the Quinault Allottees Association, brought an action in the Court of Claims for money damages against the United States for alleged mismanagement of forest lands allotted to them under the Indian General Allotment Act of 1887. In reversing a decision of the Court of Claims this Court had occasion to discuss two jurisdictional statutes, the Tucker Act, 28 USC § 1491, and the Indian Claims Commission Act, 28 USC § 1505. The Court stated, 445 US at 538-540:

> "The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U.S.C. § 1491, which gives that court jurisdiction of 'any claim against the United States founded either upon the Constitution, or any Act of Congress.' The Tucker Act is 'only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.' *United States v. Testan*, 424 U.S. 392, 398 (1976). The Act merely 'confers jurisdiction upon [the Court of Claims] whenever the substantive right exists. *Ibid.* • • •
>
> "The same is true for the tribal claimant. Jurisdiction over its claims was based on § 24 of the Indian Claims Commission Act, 28 U.S.C. § 1505.

> • • • By enacting this statute Congress plainly intended to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act. • • •
>
> • • •
>
> "Under 28 U.S.C. § 1505, then, tribal claimants have the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491, and the United States is entitled to the same defenses at law and equity under both statutes. It follows that 28 U.S.C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491." (Footnote omitted.)*

In this regard, cf. *Moe v. Salish and Kootenai Tribes*, 425 US 463, 474, n 13 (1976).

These same considerations apply with equal force to the case at bar. 28 USC § 1362 cannot be viewed as conferring any substantive rights upon the Oneidas.

D.

The Oneida Nations of Wisconsin and New York and the United States mistakenly argue that the final *proviso* contained in 25 USC § 233 renders the New York statute of limitations inapplicable to this action (Brief of Oneida Nations of Wisconsin and New York, p 41; Brief of United States as *Amicus Curiae*, pp 6, 21-22). The

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*This holding was reaffirmed in *United States v. Mitchell*, ___ US ___, 77 L Ed 2d 580, 590-591 (1983).

language relied upon* does not, as is contended by the Oneidas, "specifically [exempt] New York tribes from application of any state statute of limitations." (Brief of Oneida Nations of Wisconsin and New York, p 41). A fair reading of the statutory *proviso* reveals that, far from prohibiting the application of New York law as a frame of reference in appropriate cases, the Congress wished thereby only to make clear its view that, at least insofar as Indian land claims were concerned, federal law was to control in the first instance. But the adoption by a federal court of a state statute of limitations where no federal limitations period has been provided by Congress is a matter strictly of federal and not state law. *Auto Workers v. Hoosier Cardinal Corp.* 383 US 696 (1966). Since a state statute of limitations, once "borrowed", becomes, within the context of an action, a *federal* law, *id.*, the statutory language relied upon by the Oneidas and the United States cannot, as they suggest, act to abrogate the general rule, even in those cases relating directly to New York Indians.

Nor, contrary to the contentions of the Oneidas and the United States, would the application of New York's statute of limitations to this action be "inconsistent" with the policies underlying the 1793 Trade and Intercourse Act. At base, it is the Oneidas' position, apparently shared by the United States, that the application of New York's statute of limitations would be "inconsistent" with federal Indian policy simply because, were the statute to be applied, it would cause them to lose the litigation (Brief of Oneida Nations of Wisconsin and New York, p 42; Brief

*"*Provided further*, that nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." (September 13, 1952 was the effective date of the statute.)

of Oneida of the Thames Band Council, pp 36-37). However, this Court has made clear that " 'a state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation' ". *Board of Regents v. Tomanio*, 446 US 478, 488 (1980), quoting from *Robertson v. Wegmann*, 436 US 584, 593 (1978). Thus, in *Occidental Life Ins. Co. v. EEOC*, 432 US 355 (1977), this Court did not hold the state limitations statute inconsistent with federal law merely because it barred the claim. Rather, it refused to adopt California's one-year statutory limitations period because, given the administrative functions of the EEOC, the period was too short, as a practical matter, to permit the agency to sue at all in many cases. This would not only have frustrated the underlying Congressional goal of conciliation, but would, in effect, have rendered nugatory the right of the EEOC to sue. See 432 US at 367-369.

Here, the most nearly analogous New York State statute of limitations is contained at New York Civil Practice Law and Rules, § 212, which provides a ten-year period for the recovery of property. But in 1795, when the transaction complained of was consummated, the limitations period was 50 years (Laws of New York of 1788, ch 43,* § III). This period was reduced to 25 years in 1801 (L. 1801, ch CLXXXIII). There is no reason to believe that either period was too short to permit the Oneidas to pursue whatever claim they might have possessed under the 1793 Trade and Intercourse Act.

E.

While the Solicitor General argues (Br, pp 9-19) that the Court should imply a private right of action on behalf of the Indians, it appears to us that his later discussion (Br, pp 28-30, 33-40) describing the equitable considerations

*This was mistakenly referred to in our principal brief at page 31 as "63".

that may warrant limiting or denying relief in future Indian land claim actions is directly applicable to a proper resolution of the present case. As we have explained (Main Br, p 29), Judge Meskill properly concluded in his dissent below that many of the factors alluded to by the Solicitor General show why it would be inappropriate to imply a private right of action in the Indians at this late date of our history (e.g., JA249a). This is not to say that the rights of the Indians could not be vindicated under the Trade and Intercourse Act or the relevant Treaties, but only that the remedy envisioned 190 years ago—vindication through actions initiated by the President—should be utilized. If the Treaties with the Oneidas under which the lands at issue were acquired by the State of New York should, contrary to our view, be found not to have been ratified, then it seems clear that an overall remedy can be proposed by the President pursuant to section 5 of the Trade and Intercourse Act, an alternative not available to the courts responding to a series of suits. Implying private rights of action in these cases is not only unwarranted under the applicable laws but could, indeed, lead to great mischief.

POINT II.

A.

The counties argue that New York, like Alabama in *Parden v. Terminal Railway Co.*, 377 US 184 (1964), had impliedly waived its immunity to suit by engaging in "a proprietary activity, undertaken chiefly for the purpose of making a profit" (Brief of Counties of Oneida and Madison, as respondents in No. 83-1240, p 19). While this argument has no merit, as we will discuss, we believe it important to point out again, as we did in our opening brief

(p 41), that this Court has no occasion even to reach the governmental-proprietary activity issue in view of its decision in *Edelman v. Jordan*, 415 US 651 (1974). Moreover, even if the State's acts in dealing with the Oneidas were viewed as a waiver of immunity insofar as the Oneidas are concerned, such a waiver would not properly be viewed as extending to the counties.

The counties' contention that the State's motivation in securing possession of the subject lands and making them available for settlement was "chiefly for the purpose of making a profit" (Br, p 19) is belied by the solicitude which the State of New York, as mortgagee and bondholder, showed towards those settlers to whom it had sold land and who were unable to meet their obligations. Between the years 1801 and 1811, no fewer than five enactments granting relief to the purchasers of land in what formerly had been the Oneida, Onondaga and Cayuga reservations were passed into law by the State Legislature (L 1801, ch 134, L 1803, ch LXI, L 1808, ch CLI, L 1810, ch CXVII, L 1811, ch CCXVII).* These enactments, which forgave defalcations in the payment of both interest and principal and stayed prosecutions based upon such defalcations, demonstrate quite clearly that the interest of the State in purchasing the subject lands was "settlement" and not "profit". This is a sovereign concern and the State was not engaging in private enterprise.

B.

The counties also make much of the fact that the Trade and Intercourse Act of 1793 was enacted after the decision of this Court in *Chisholm v. Georgia*, 2 US (2 Dall.) 419 (1793), and before the ratification of the Eleventh Amendment (Br, p 14, n 10). They argue that the Congress which enacted the 1793 Act must, in light of the controversy surrounding *Chisholm*, have been aware that the federal

*For the convenience of the Court, copies of these enactments are reproduced in the Appendix to this brief.

judiciary then considered the States to be "generally subject to suit in federal court", and would, if it wished to exclude them from suits under the Trade and Intercourse Act, specifically have so provided (Br, p 19). However, the decision in *Chisholm v. Georgia* was not as broad-based as the counties would have the Court believe. Far from abrogating the fundamental principle of sovereign immunity, *Chisholm* held only that under the express language of Article III, section 2 of the Constitution, a State was liable to be sued by a citizen of another State, or of a foreign country; the immunity of the States from suits brought by their own citizens remained, under that decision, unaffected and unimpaired. Hence, the counties are wrong when they assert that "clear indication of congressional intent to subject states to suit [under the 1793 Trade and Intercourse Act] should not be required" (Br, p 19; emphasis in original). In view of the "shock of surprise" created by the *Chisholm* decision (*Monaco v. Mississippi*, 292 US 313, 325 [1934]), and the fact that the holding there did not speak to the immunity of States from suits by their own citizens, there is no reason to assume that the Congress in 1793 would, by its silence, have intended to deprive the States of that immunity. As this Court recently observed in *Pennhurst State School and Hospital v. Halderman*, _____ US _____, 79 L Ed 2d 67, 76-77 (1984):

> "The [Eleventh] Amendment's language overruled the particular result in *Chisholm*, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III. Thus, in *Hans v. Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the Court held that, despite the limited terms of the Eleventh Amendment, a federal court could not entertain a suit brought by a citizen against his own

> State. After reviewing the constitutional debates concerning the scope of Art III, the Court determined that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States'. *Id.*, at 15, 33 L Ed 842, 10 S Ct 504. See *Monaco v. Mississippi*, *supra*, at 322-323, 78 L Ed 1282, 54 S Ct 745 (1934). In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art III • • • ." (Footnote omitted.)

CONCLUSION.

For the reasons stated here and in the State's principal brief, the judgment of the Court of Appeals should be reversed.

Dated: Albany, New York
September, 1984

Respectfully submitted,

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APPENDIX.

LAWS OF NEW YORK.

CHAP. 134.

AN ACT granting relief to purchasers of lands in the late Oneida Onondaga and Cayuga reservations.

Passed the 3rd of April, 1801.

Be it enacted by the People of the State of New York, represented in Senate and Assembly, That all interest already accrued, or which may accrue before the first Tuesday in July next upon the mortgages for any lands which were either sold at public auction by the people of this State, or were purchased by persons having the right of pre-emption, situate in the late Oneida and Cayuga reservations, and also two years interest in arrear in the lands so circumstanced in the Onondaga reservation, shall be and hereby are remitted to the purchasers of the same lands respectively and their assigns, being actual settlers on the said land, at the time of the passing of this act, so that in all cases of stipulations made upon the sale or assignment of any of the said lands for or including the payment of any interest upon any of the said mortgages, the said remission shall inure to the benefit of the persons assuming the payment of the same, being settlers on the said lands as aforesaid: And the surveyor general of this State upon receiving satisfactory evidence from any person claiming the benefit of such remission, that he is entitled thereto, shall and he is hereby directed to enter such remission of interest upon the mortgage to the people of this State of the land on which such claimant resides.

And be it further enacted, That an interest of three per centum only, for the period of five years, shall be demanded upon all mortgages of lands which were sold at public vendue as aforesaid in the said Cayuga reservation, subject nevertheless to the restriction and limitations contained in the preceding clause.

And be it further enacted, That the comptroller shall immediately after the passing of this act, credit Peter Smith towards the principal of his mortgage upon lands in the late Oneida reservation, with the amount of fifty four cents five mills per acre, for all the lands contained in the said mortgage, being the difference between the mean price as was calculated upon the lands south of the Genesee road in said reservation, and the mean price upon the whole tract as was originally intended by law. And shall on the first Tuesday of July next, debit the said Peter Smith with the amount of the arrearages of interest, which may then remain unpaid on said mortgage, which amount shall be added to the principal, and to be paid in same manner as the residue of the said mortgage: *Provided always*, that neither the said Peter Smith, nor any grantees under him shall be entitled to any of the benefits, contained in the provisions of the first section of this act.

And be it further enacted, That on the said Peter Smith, his heirs or assigns producing to the comptroller any bonds executed to the people of this State, and payable in ten years with the interest annually at the rate of six per cent per annum, accompanied by mortgages to secure the payment of the same respectively, duly acknowledged and registered, on lands mortgaged as aforesaid by the said Peter Smith in the Oneida reservation together with satisfactory proof, that the lands described in such mortgages are worth the sums expressed therein, and that the said bonds and mortgages were given in consequence of a fair and bona fide purchase of the lands described therein, made by the persons

who executed the same, of the said Peter Smith, his heirs, or assigns, that then the comptroller shall credit the said Peter Smith the amount of such bonds and mortgages, upon the mortgage given by him as aforesaid.

And be it further enacted, That whenever the principal and interest secured by any such mortgages shall be paid, the lands comprised therein respectively shall be and hereby are released and discharged from the mortgages given to the people of this State thereon. *Provided always*, that satisfactory proof shall be given to the comptroller on the production of any such bonds and mortgages as aforesaid by the said Peter Smith, his heirs, or assigns that the lands contained in any such mortgages are not greatly undervalued; *and provided also*, that the sum of twenty five dollars shall be paid upon the production of the said bonds and mortgages for every hundred acres contained therein, and so in proportion, and which sum shall be credited on the mortgage given by the said Peter Smith to the people of this State.

And be it further enacted, That the benefit of this act shall not be extended to the said Peter Smith his heirs, or assigns beyond the period of two years from the passing hereof.

And be it further enacted, That the comptroller shall stay all prosecutions already commenced, or which are by law directed to be commenced against the purchasers at auction of the Oneida Cayuga and Onondaga reservations, for eight months from the passing of this act.

CHAP. LXI.

An ACT for the Relief of the Purchasers of Land in the Cayuga, Oneida and Onondaga Reservations.

Passed March 28th, 1803.

WHEREAS it is represented to the Legislature, by the purchasers of lands in the Cayuga, Oneida and Onondaga reservations, that the immediate payment of the whole amount of the interest due to the state for their purchases, and the payment of such part of the principal as will soon become due, would greatly embarrass them in their present situation: Therefore,

I. *BE it enacted by the People of the State of New York, represented in Senate and Assembly*, That there be allowed to the said purchasers nine months from the first day of May next, for the payment of the one half of the interest due, and to grow due on the said purchases, and the term of one year from and after the expiration of the said nine months, for the payment of the residue of the said interest.

II. *And be it further enacted*, That the time of payment of the principal sums due from such of the said purchasers as shall pay the interest due on their respective purchases in manner aforesaid, shall be extended and paid in four equal instalments, that is to say, the first on the first Tuesday of July, in the year one thousand eight hundred and eight; the second on the first Tuesday of July, in the year one thousand eight hundred and nine; the third on the first Tuesday of July, in the year one thousand eight hundred and ten; the fourth and last on the first Tuesday of July, in the year one thousand eight hundred and eleven; and that the comptroller stay all prosecutions against such of the said purchasers as shall pay the interest due on their said purchases as above directed.

III. *And be it further enacted*, That it shall be the duty of the comptroller, to prosecute without delay such of the said purchasers as shall refuse or neglect to pay into the treasury, within the respective periods above limited or either of them, the interest due or to grow due on the said purchases as aforesaid.

IV. *And be it further enacted*, That in all cases where debts are due to the people of this state, by several mortgages, contracts or obligations, executed by the same person, only one suit shall be commenced against the debtor or his representatives for the monies so due.

V. *And be it further enacted*, That the payments which have heretofore been made, on account of any of the said purchases in the Oneida, Onondaga and Cayuga reservations shall be applied towards discharging the interest due on such purchases, and in case such payment shall exceed the interest, the excess shall be applied to the reduction of the principal of the said purchases.

VI. *And be it further enacted*, That the second section of the act, entitled "An act granting relief to purchasers of lands in the late Onondaga and Cayuga reservations," shall be and is hereby extended to all persons who were entitled by virtue of any former statute of this state, to the right of pre-emption to any lands situate in the late Cayuga reservation.

CHAP. CLI.

An ACT to amend an act, entitled "an act for the relief of the purchasers of land in the Cayuga, Oneida and Onondaga reservations," passed the 28th day of March, 1803.

Passed April 6th, 1808.

WHEREAS it is represented to this legislature, by the purchasers of lands in the Cayuga, Oneida and Onondaga reservations, that many of them did not avail themselves of the

benefit of the act, entitled "an act for the relief of purchasers of lands in the Cayuga, Oneida and Onondaga reservations," passed the 28th day of March, 1803. *And whereas*, under the present embarrassed state of our public affairs the immediate payment of the whole amount of the interest and of the principal due to the state from said purchasers would greatly distress and embarrass them. Therefore,

Be it enacted by the people of the state of New-York, represented in senate and assembly, That there shall be allowed to the said purchasers of the Cayuga, Oneida and Onondaga reservations, one year from the seventh day of July next, for the payment of one fourth part of the interest due and to grow from the said purchasers, and the term of two years from the said seventh day of July, for the payment of one other fourth part of the said interest, and the like yearly extended periods, for the payment of the residue of said interest, and in like proportion.

And be it further enacted, That the time of payment, of the principal due from such of the said purchasers as shall pay the interest due from them respectively, in manner aforesaid, shall be extended, and the said principal shall be paid in six equal instalments, that is to say: the first instalment on the seventh day of July, in the year one thousand eight hundred and twelve, the second on the seventh day of July, in the year one thousand eight hundred and thirteen, the third on the seventh day of July, in the year one thousand eight hundred and fourteen, the fourth on the seventh day of July, in the year one thousand eight hundred and fifteen, the fifth on the seventh day of July, in the year one thousand eight hundred and sixteen, and the sixth on the seventh day of July, in the year one thousand eight hundred and seventeen; and that the comptroller stay all prosecutions against such of the said purchasers as shall pay the interest due on the said mortgages as aforesaid, and the expenses of prosecution if any have been incurred.

And be it further enacted, That it shall be the duty of the surveyor-general of the state, to execute to Alfred Edson, or his assigns, or to such person as he or they shall nominate, a conveyance in fee of lot number fifty three, in the first allotment of New-Petersburgh, in the late Oneida reservation: *Provided*, the said Alfred, or the occupants of said lot, claiming under him, shall produce to the said surveyor general satisfactory proof of his or their being entitled, as sub-lessees of Peter Smith, to the pre-emption of said lot of land, under the acts in that behalf provided; and shall secure by mortgage, as near as may be conformably to the forms prescribed to be taken from such sub-lessees, such sum per acre for said lot as was exacted from the said other sub-lessees in said tract, computing interest thereon, and deducting such remission of interest as has been granted to the said other sub-lessees by an act for that purpose: *And provided further*, That the said survey-or-general shall not require for his satisfaction the production of the original lease from the said Peter Smith, if reasonable evidence shall be offered him of the contents and loss thereof.

And be it further enacted, That all such persons as were purchasers and actual owners of land in the late Oneida, Cayuga and Onondaga reservations, on the 3d day of April, one thousand eight hundred and one, who did not avail themselves of the benefit of the act, entitled "an act for the relief of the purchasers of lands in the late Oneida, Onondaga and Cayuga reservations," passed the 3d day of April, one thousand eight hundred and one, and who had on the 11th day of April, one thousand eight hundred and four, made improvements and actual settlements thereon, to the value of fifty dollars, shall be and are hereby entitled to the same remission of interest as though they had been actual settlers at the time of passing the said act: *Provided*, That satisfactory proof thereof be produced to the comptroller, within nine months after the passing of this act: *And*

provided further, That Peter Smith, and owners of land deriving title under him, shall not be included within the purview of this act, nor entitled to its benefit.

CHAP. CXVII.

An ACT *granting further Time for the Payment of certain Monies due to the State, and for other Purposes.*

Passed April 2, 1810.

BE *it enacted by the People of the State of New-York, represented in Senate and Assembly*, That such of the purchasers of lands in the Cayuga, Onondaga and Oneida reservations, notwithstanding their neglect to pay by the seventh day of July last, the one fourth part of the interest then due on their respective mortgages to the state, agreeably to the provisions of the act passed the sixth day of April, in the year one thousand eight hundred and eight, entitled "an act to amend an act entitled an act for the relief of the purchasers of land in the Cayuga, Oneida and Onondaga reservations," passed 28th March, 1803, who shall on or before the seventh day of July next, pay the one half of the interest which may then be due, and on or before the seventh day of July, which will be in the year one thousand eight hundred and eleven, pay the whole of the interest which may then be due on their respective mortgages, and shall thereafter annually pay the interest and the instalments of principal as required by said act, shall be allowed the like extended periods for the payment of the principal due on their respective mortgages, as if they had not neglected to pay the one fourth of the interest due the seventh of July

last; *Provided however*, That this provision shall not be considered as extending to mortgages already in a train for collection by the attorney-general, unless those whose mortgages are already in a train of collection shall, on or before the first day of May next, pay one half of the interest which shall then be due on their respective lots, and pay all costs which has or may accrue by reason of the foreclosure of said mortgages, and those who shall so do shall have the same extended periods for the payment of the money due from them to the state as is mentioned in this act.

II. *And be it further enacted*, That all other persons now indebted to the state, either by bond or mortgage, for purchase monies of lands sold to them by the state, be and they are hereby allowed until the first day of September next, to pay the interest which they may respectively owe on such bonds or mortgages, and all such as shall then pay the whole of the interest which may be due from them shall be allowed until the first day of September, in the year one thousand eight hundred and eleven, to pay the first instalment of principal which is now due or that may then remain due against them respectively: *Provided however*, That this provision shall not be construed to extend to persons indebted for lands sold for the purpose of raising money for opening and improving roads.

III. *And be it further enacted*, That the comptroller be and he is hereby authorized at the expense of this state to publish in as many newspapers as he may deem necessary not exceeding four, and for any time not exceeding three months, the two first sections of this act; and that he also be authorized at any time hereafter in the same way to publish such laws or parts of laws as may at any time pass respecting debts due to the state, and which he may think it necessary to publish for the information of the persons indebted: *Provided* the expense of such publications shall not in any one year exceed the sum of fifty dollars.

IV. *And be it further enacted*, That the treasurer be and he is hereby directed on the warrant of the comptroller, to pay to Archibald M'Intyre the sum of three dollars and fifty-six cents, being the amount of the expense incurred by him for causing to be published the first section of the act, entitled "an act for granting further time for the payment of certain monies due to the people of this state," passed the seventeenth day of March last.

CHAP. CCXVII.

An ACT *reviving the fourth Section of an Act, entitled "An Act to amend an Act for the Relief of the Purchasers of Land in the Cayuga, Oneida and Onondaga Reservations, passed the 6th April, 1808.*

Passed April 9, 1811.

BE *it enacted by the People of the State of New-York, represented in Senate and Assembly*, That the provisions of the fourth section of the act to amend an act, entitled "an act for the relief of the purchasers of land in the Cayuga, Oneida and Onondaga, reservations," passed the 6th day of April, 1808, be and the same is hereby revived: *Provided*, That satisfactory proof by the person claiming such remission of interest be produced to the comptroller within nine months from the passing of this act.